TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 596

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS, APPELLANTS,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED OCTOBER 28, 1927

(33,048)

(33,048)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1927

In the Supreme Court of the United States

No. [illegible]

The Sioux and Warriors Bands of Sioux Indians

v.

The United States

[illegible]

On Motion to Dismiss

On March 12, 19[illegible], counsel for the [illegible] filed their original petition. Said petition was filed by Powers, Flynn & Traynor, as attorneys for plaintiffs.

On May 11, 19[illegible], a motion [illegible] was entered under Rule 12.

On May 7, 19[illegible], counsel for defendant [illegible] filed a demurrer to said petition.

On October 21, 19[illegible], the demurrer was submitted and argued by counsel for the respective parties.

On November 12, 19[illegible], the court entered the following order, to wit, to-wit:

Order

The cause was submitted upon the defendant's general demurrer to the petition herein. On consideration whereof, the Court being advised that the same should be overruled, but without prejudice to the right of the defendant to raise the question upon the several items contained or asserted in the plaintiffs' bill. The demurrer is accordingly overruled.

And it appearing from the stipulation of counsel which thereafter is filed, that it appears that the petition [illegible] set forth all the facts on which the said bands of Indians [illegible] have based their claim, and it further appearing that there [illegible] Brules of such Congressional action [illegible] the equity relative to the use of part of said claims, it is ordered that the plaintiffs shall, more particularly and separately, the facts relied on to sustain the several claims, and to what action has been taken on the subject matter of any of the claims by the Congress or in the courts, the facts relied upon to impeach

such action, or the conclusiveness thereof, shall be stated more definitely than in the present petition, and the plaintiffs are given until the first day of April, 1920, to comply with this order.

II. AMENDED PETITION. Filed March 26, 1920

To the Honorable the Chief Justice and the Associate Justices of the Court of Claims of the United States:

Your petitioners the Sisseton and Wahpeton Bands of Sioux Indians under the authority of the Act of Congress hereinafter cited (Public No. 43, 66th Congress, approved April 11th, 1919) having on the 17th day of March, A. D. 1917, filed their petition in this court in the above entitled matter and thereafter defendant having on due time filed its answer to said petition and later and on April 30, 1919 defendant having with the consent of plaintiffs, made its motion for leave to file a demurrer to the petition of plaintiffs and said motion for leave to file such demurrer having been allowed on May 7, 1919, and defendant thereafter and on May 9, 1919, having filed its demurrer to plaintiffs' petition 21 upon with brief in support thereof, such demurrer being interposed on the ground that said petition does not allege facts sufficient to constitute a cause of action, and plaintiffs having on September 2, 1919 filed their reply brief in opposition to the allowance of such demurrer and this court having on the 17th day of November, 1919 filed its order overruling said demurrer and requiring plaintiffs to "state with more particularity and certainty the facts relied on to sustain the several claims, and in case action has been taken on the subject matter of any of the claims by treaty or by Congress or in the courts, the facts relied upon to impeach such action, or the conclusiveness thereof, shall be stated more definitely than in the present petition." Your petitioners therefore now file this their amended petition and respectfully state and show:

That said Act of Congress above referred to is entitled "An Act conferring jurisdiction on the Court of Claims to hear, determine, and render judgment in claims of the Sisseton and Wahpeton Bands of Sioux Indians against the United States," and provides as follows:

"That all claims of whatsoever nature which the Sisseton and Wahpeton bands of Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, for the amount due or claimed to be due said bands from the United States [vol. 41 under any treaties or laws of Congress; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all claims of said bands against the United States and also any legal or equitable defense, set-off, or counterclaim which the United States may have against said Sisseton and Wahpeton bands of Sioux Indians to enter judgment, and in determining the amount to be entered herein the court shall deduct from any sums found due said Sisseton and Wahpeton bands of Sioux Indians any and all gratuities paid said bands or individual members thereof subsequent to March third, eighteen hundred and sixty three: Provided that in determining the amount to be entered herein the value of the land involved shall not exceed the value of such land on March third, eighteen hundred and sixty three. If any such question is submitted to said court it shall settle the rights, both legal and equitable, of said bands of Indians and the United States, notwithstanding lapse of time or statute of limitations. Such action in the Court of Claims shall be presented by a single petition, to be filed within one year after the passage of this Act, making the United States a party defendant which shall set forth all the facts on which the said bands of Indians base their claims for recovery; and [vol. 5] the said petition may be verified by the agent or authorized attorney or attorneys of said bands, to be selected by said bands and employed under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior in accordance with the provisions of existing law upon information and belief as to the existence of such facts, and no other statement or verifications shall be necessary. Official letters, papers, reports, and public records, or certified copies thereof, may be used as evidence."

That Flynn & Traynor, of Devils Lake, N. D., are the authorized attorneys of said bands of Indians, selected by said Indians and employed under contract approved as in said Act provided.

One

That by section One of the Act of Congress, approved March 3rd, 1863, 12th Statutes at Large, P. 819, it was provided:

"That the President is authorized and hereby directed to assign and set apart for the Sisseton and Wahpeton, Medawakanton and Wahpakoota bands of Sioux Indians, a tract of unoccupied land outside the limits of any State sufficient in extent to enable him to assign to each member of said bands [illegible] acting to obtain the pursuit of agriculture, eighty acres of good agricultural lands thereof same to be well adapted to agricultural purposes."

That said Act was direct and mandatory and left to the discretion to the President and his duty to deal with the President set apart a tract of country for the Medawakanton and Wahpakoota bands of Sioux Indians as in said Act authorized and directed, but failed to make compliance therewith so far as to set apart for the Sisseton and Wahpeton bands of Sioux Indians and no lands were ever set apart for said Sisseton and Wahpeton bands of Sioux Indians as authorized and directed in said Act.

That said reservation was set apart for the Medawakanton and Wahpakoota Indians, then known as Santee Sioux, at Ushers Landing, Dakota Territory (Now South Dakota) by Executive Order of July 1st, 1863, and further 1,200 of said last mentioned bands of Sioux Indians were removed by the defendant arriving May 20th, 1867 a short time prior to the date of the executive order setting aside the territory or reservation at Ushers Landing, that the land set apart at Ushers Landing was for those Santee Sioux Indians who had prior to that date arrived there and was not intended for any of the other members of the Medawakanton and Wahpakoota bands of Santee Sioux Indians and not for any member or members of plaintiff bands and only a sufficient area was set apart by said Executive Order to provide for said 1,200 members of the Medawakan

ton and Wahpakoota bands of Santee Sioux Indians who [fol. 7] had already arrived there (I. O. R. 1863 316 21).

That plaintiff bands were not members of the Santee Sioux but were separate and distinct bands and never were Santee Sioux. This contention is upheld in the concurring opinion of Judge Nott in Sisseton and Wahpeton Bands of Dakota or Sioux Indians vs. The United States, No. 22524, decided January 18, 1904. In his concurring opinion Judge Nott states he finds facts regarding the Minnesota Uprising of 1862 as stated to Senator Davis of Minnesota in a speech before the United States Senate February 8, 1889, in which Senator Davis said that the Santees, one band of the four tribes (Sisseton and Wahpeton and Medawakanton and Wahpakoota) were responsible for that uprising. Dr. A. L. Riggs, great Indian Authority, says that "Isanyati" from which "Santee" was derived was properly applied only to Medawakantons. (See P. 376 Bulletin 30, Bureau of American Ethnology.)

Document 68 page 13 referring to payments made plaintiff bands refers to money having been expended for them either among the Sisseton and Wahpetons and the Santees, showing conclusively that the Interior Department knew plaintiffs were not Santees.

It will be noted that Document 68, page 11 in several places refers to Sisseton and Wahpeton Indians as such and to the Santees as an entirely different tribe.

From reading Senate Documents 67 and 68 anyone will be [fol. 8] convinced that plaintiff bands never were Santee Sioux.

That said land at said Ushers Landing was sandy and unfit for cultivation and many of said Indians removed there died and those remaining were removed in 1866 to Niobrara, Nebraska. (I. O. R. 1866, pp. 34 212 3; I. O. R. 1872, p. 280) that the Indians so removed to Niobrara, Nebraska were all members of the Medawakanton and Wahpakoota bands of Santee Sioux; that no member or members of plaintiff bands were removed to, located at or received tracts of land at either Ushers Landing, Dakota (now South Dakota) or Niobrara, Nebraska.

That it was not intended that the members of plaintiff bands should be removed to or should receive allotments on the Niobrara River in Nebraska under Executive Order of February 27th, 1866 because under this order but four

townships were set apart and if it would not provide 80 acre tracts for more than 1,152 Indians and there were nearly that number of the Medawakanton and Wahpakoota bands of Santee Indians removed there in 1866, being the remainder of the 1,946 who had been placed on the Crow Creek reservation at Ustors Landing.

Some of these died there, a considerable number, and after the remainder were removed to the Reservation on the Niobrara River in Nebraska there were added the two hundred who had been imprisoned at Davenport, Iowa. (See I. O. R. 1866 and 1872 supra).

That the reservation on the Niobrara River, Nebraska [fol. 9] was not set apart, nor was any portion of it set apart for any member of the plaintiff bands of Indians.

That the reservation at the mouth of the Niobrara River in Nebraska was much smaller in extent than that at Crow Creek, Dakota showing that it was set apart only for those Indians removed there from Crow Creek.

That in the map accompanying, attached to and made a part of Document 68 called "Map of the Cessions and Reservations of the Upper and Lower Sioux Indians" but affecting only treaties and acts relating to plaintiff bands of Sioux Indians, the reservation in Nebraska above mentioned is not shown while it is shown on the map attached to Document 67 affecting treaties and acts relating to the Medawakanton and Wahpakoota bands. The reservation at Crow Creek is shown on both maps but it is an admitted fact that only Indians from Crow Creek were removed to Niobrara River, Nebraska, and Document 67 relates only to Medawakanton and Wahpakoota bands. If plaintiff bands had any interest in the reservation in Nebraska that reservation would be shown on map attached to Senate Document 68.

Plaintiff bands of Indians were not given lands under the Treaty of February 19th, 1867 (15 Stat. L. 505) to satisfy their claim under the Act of March 3rd, 1863 for the reason that both the reserves that *held the* lands inclined in the Devils Lake and Lake Traverse Reservations already belonged to the plaintiff bands of Indians and they were never paid anything for the lands they now occupy [fol. 10] or ever occupied as allotments on these new reservations, but the area of these two reservations was de-

ducted when alleged payment was made for surrounding territory under the Treaty of September 20, 1872.

It is true that the treaty of February 19, 1867, purported to "set apart" these two reservations but the Government recognized the ownership of these lands by plaintiff bands of Indians in this treaty and the Treaty of September 20, 1872, and therefore the claim of the plaintiffs under Act of March 3rd, 1863, was not satisfied by giving them lands already theirs.

Under the Agreement of September 20, 1872 (15 Stat. L. 505), by which the plaintiff bands of Indians sold consolidated of their lands to defendant, certain tracts known as the Devils Lake Indian Reservation and the Lake Traverse Reservation were retained for the plaintiff bands of Indians and later the unallotted lands of plaintiff bands on these reservations were sold by plaintiff bands, but there was nowhere anything in the agreement last mentioned which provided that the retention of these reservations by plaintiff bands of Indians was in satisfaction or settlement of the grant to which each member of said bands was entitled under the Act of March 3, 1863. That the retention of these reservations when the other surrounding lands were sold to defendant under the agreement of September 20, 1872, could not in any event constitute the carrying out of the provisions of the Act of March 3, 1863, because as was stated in reference to the Act of February 19, 1867 (15 Stat. 11) Stat. L. 505) the lands included in the limits of these two reservations already belonged to the plaintiff bands and their rights in and ownership of said tracts were recognized by the Government when it purchased the lands adjoining these reservations under the Agreement of September 20, 1872, as amended.

Neither the Treaty of April 29, 1868, nor the Act of March 2, 1889, referred to, affected or in any way concerned plaintiff bands of Indians, nor were plaintiff bands entitled to lands under this treaty or act which applied entirely to other bands of Sioux Indians. The Sisseton and Wahpetons were not parties to the treaty of April 29, 1868. This treaty was signed by the Santee band then residing in Nebraska and was not in any way binding on plaintiffs. The Act of March 2nd, 1889. This treaty was signed by

the Santee band of Indians now occupying a reservation in the State of Nebraska."

That plaintiff bands have never applied to this or any other court concerning the matter of their claim under the said Act of March 3rd, 1863, and said claim has never been heard in this court, nor have plaintiffs received any allotment, obtained any selection, received any remuneration or payment by treaty or otherwise for the said lands to which they were entitled under said act. That their rights herein are legal and equitable.

That in right, justice and equity they are entitled to such lands now or the value thereof.

That at the date of the passage of said Act, March 3rd, [fol. 12] 1863, the said Sisseton and Wahpeton bands of Sioux Indians numbered four thousand five hundred twenty four (4,524) persons (See concurring opinion of Judge Nott in Sisseton and Wahpeton Bands of Dakota or Sioux Indians vs. United States, Court of Claims No. 22524), all of whom were willing to adopt the pursuit of agriculture and the said Sisseton and Wahpeton bands of Sioux Indians were therefore entitled to have set apart to them at said time a tract of land containing an area of three hundred sixty one thousand, nine hundred twenty (361,920) acres of good agricultural land.

That the value of such land so directed to be set aside for these petitioners was not less than one dollar and twenty five cents ($1.25) per acre on the 3rd day of March, 1863. (See 3 Act March 3, 1863.)

That petitioners are entitled in justice and equity to recover from the United States at this time the said value thereof, to wit: The sum of Four hundred fifty two thousand, four hundred ($452,400) dollars together with interest at five (5) per cent per annum from March 3rd, 1863, or in lieu thereof three hundred sixty one thousand nine hundred twenty (361,920) acres of good agricultural land.

Two

That under the agreement between the petitioners and the United States dated the 20th day of September, 1872 as amended on the 2nd day of May 1873, the petitioners ceded to the United States a tract of land estimated by the [fol. 13] Commissioners who negotiated said agreement on

behalf of the United States, to contain eight million (8,000,000) acres and compensation was made by the United States to petitioners on that basis; that said tract so ceded in fact contained (according to the records of the Interior Department) eleven million (11,000,000) acres being three million (3,000,000) acres in excess of that estimated by such Commissioners who so negotiated said treaty for and on behalf of the United States and without the consent of the petitioners who were erroneously deprived of compensation for such excess.

That petitioners were paid for said eight million (8,000,000) acres the sum of eight hundred thousand ($800,000) dollars or only ten cents (10¢) per acre. That said sum of ten cents (10¢) per acre so paid for said lands was but a fraction of what said lands were worth on March 3rd, 1863 and the price so paid to petitioners by the United States was entirely inadequate and therefore said treaty was unjust and inequitable; that petitioners believed they were in fact ceding only approximately eight million (8,000,000) acres of land whereas they were ceding eleven million (11,000,000) acres; that they were misled by said Commissioners as to the actual acreage being ceded by them and they did not intend to cede but approximately eight million (8,000,000) acres of land under said treaty; that they have never been paid for the balance of such land ceded by them, to wit: Three million (3,000,000) acres.

Plaintiff bands further claim that but few of the Indians [fol. 14] whose names appear to be signed to said treaty, actually signed said treaty and that because of their inability to understand the English language advantage was taken of them; that in fact certain of the Indians of plaintiff bands whose names were signed to said treaty (by mark) were actually forced to sign said treaty, all of which was unfair, unjust and inequitable.

That under the Act of June 7, 1872 under the authority of which said Commissioners negotiated with plaintiff bands of Indians for the cession of said lands as hereinbefore mentioned said Commissioners, representing the Secretary of the Interior acted under instructions to ascertain what compensation ought in "justice and equity" be paid to said bands for the extinguishment of their title to said tracts; that their report recommending that eight hundred

thousand dollars ($800,000) should be paid for eleven million (11,000,000) acres of land was unjust and inequitable.

That subject to certain rights theretofore ceded by plaintiff bands of Indians to the United States under Article 2nd of the treaty of February 19th, 1867, plaintiff bands of Indians were the owners of, in possession of and entitled to compensation for the full value of said lands.

That said lands on the date of the cession, to wit, September of February 19th, 1867 were of little or no money value and consisted of the cession to the United States of the right to "construct wagon roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the government may require over and across the lands claimed by said bands (including their reservation as [fol 13] hereinbefore described) over any route or routes that may be selected by authority of the government."

That said lands on the date of the cession to wit September 20th, 1872 (as amended May 2nd 1873) were worth in excess of one dollar and twenty five cents ($1.25) an acre because as stated by said Commissioners "of the fertility and other natural advantages of the country, its proximity to railroad improvements, now being rapidly extended through the territory in question."

That no interest was paid plaintiff bands on said sum of eight hundred thousand ($800,000) dollars paid to them over a long period of years.

That except as hereinbefore stated no other Treaty made by plaintiff bands of Indians ceded any of their interest in or to said lands and that the matters in this item and count involved have never been before this court or any other court for adjustment, payment or settlement and no action has ever been taken on the subject matter of this claim. That in the former case of plaintiff bands against the United States (Court of Claims No. 22,624) the petition (Page 17) stated that "however monstrously unfair" the Treaty of September 20, 1872 was to plaintiff bands of Indians, the claims thereunder "appear to have no relation whatever to the matters under consideration in this case." That case involved as we understand it, only the restoration of certain annuities not in the present case involved. The first words of Mr. Justice Holmes in the opinion of the Supreme Court of the United States in the former case of [fol 16] Sisseton and Wahpeton Bands of Dakota or Sioux

Indians v. The United States are: "This is a claim for annuities granted by the treaty of July 23rd, 1851, [10 Stat. 949, but declared forfeited by the act of February 16, 1863, 12 Stat. 652" 208 U. S. 564.

That the value of said land on March 3rd, 1863 was the sum of one dollar and twenty five cents ($1.25) an acre.

That in justice and in equity plaintiffs should receive $1.25 per acre for the three million (3,000,000) acres for which they have never been paid and one dollar and fifteen cents ($1.15) per acre for the eight million (8,000,000) acres for which they have only received ten cents (10¢) an acre.

Wherefore the United States is indebted to petitioners in the sum of twelve million one hundred and fifty thousand ($12,150,000) dollars and interest thereon at the rate of five per cent per annum since the 2nd day of May, 1873.

Three

That on the 23rd day of July, 1851, a Treaty was entered into between the petitioners and the United States wherein it was agreed as follows:

Article 1. It is stipulated and solemnly agreed that the peace and friendship now so happily existing between the United States and the aforesaid bands of Indians, shall be perpetual.

Article 2. The said Sioux [illegible] and Wahpaton bands [illegible] of Dakotah or Sioux Indians, agree to cede, and do hereby cede, sell, and relinquish to the United States, all their lands in the State of Iowa; and, also all their lands in the Territory of Minnesota, lying east of the following line, to wit:

Beginning at the junction of Buffalo River with the Red River of the North; thence along the Western bank of said Red River of the North, to the mouth of the Sioux Wood River; thence along the western bank of said Sioux Wood River to Lake Traverse; thence along the western shore of said lake, to the southern extremity thereof; thence in a direct line, to the junction of Kampeska Lake with the Tehan kas an data, or Sioux River; thence along the western

bank of said river to its point of intersection with the northern line of the State of Iowa; including all the islands in said river and lake.

Article 2. In part consideration of the foregoing cession the United States do hereby set apart for the future occupancy and home of the Dakota Indians, parties to this treaty, to be held by them as Indian lands are held, all that tract of country on either side of the Minnesota River, from the western boundary of the lands herein ceded, east, to the Tchan-tan-sar River on the North and to Yellow Medicine River on the south side, to extend, on each side, a distance of not less than ten miles from the general course of said river, the boundaries of said tract to be marked out in as straight lines as practicable, whenever deemed expedient by the President, and in such manner as he shall direct.

Article 3. In further and full consideration of said cession the United States agree to pay said Indians the sum of one million six hundred and fifty-five thousand dollars (1,655,000) at the several times and in the manner and for the purposes following, to wit:

1st. To the chiefs of the said bands, to enable them to settle their affairs and comply with their present just engagements, and in consideration of their removing from the country set apart for them as above, which they agree to do within two years, or sooner if required by the President, without further cost or expense to the United States, and in consideration of their subsisting themselves the first year after their removal, which they agree to do without further cost or expense on the part of the United States, the sum of two hundred and seventy-five thousand dollars (275,000). Provided, That said sum shall be paid to the chiefs in such manner as they, hereafter in open [fol. 19] council shall request, and as soon after the removal of said Indians to the home set apart for them, as the necessary appropriation therefor shall be made by congress.

2nd. To be laid out under the direction of the President for the establishment of manual labor schools, the erection of mills and blacksmith shops, opening farms, fencing and breaking land, and for such other beneficial objects as may

be deemed most conducive to the prosperity and happiness of said Indians, thirty thousand dollars ($30,000).

The balance of said sum of one million six hundred and sixty-five thousand dollars ($1,665,000) to wit: one million three hundred and sixty thousand dollars ($1,360,000) to remain in trust with the United States, and five per cent interest thereon to be paid annually to said Indians for the period of fifty years, commencing the first day of July eighteen hundred and fifty-two (1852) which shall be in full payment of said balance, principal and interest, the said payment to be applied under the direction of the President, as follows, to wit:

3rd. For a general agricultural improvement and civilization fund, the sum of twelve thousand dollars ($12,000).

4th. For educational purposes, the sum of six thousand dollars ($6,000).

[fol. 20] 5th. For the purchase of goods and provisions, the sum of ten thousand dollars ($10,000).

6th. For money annuity, the sum of forty thousand ($40,000) dollars.

Article 5. The laws of the United States prohibiting the introduction and sale of spirituous liquors in the Indian country shall be in full force and effect throughout the territory hereby ceded and lying in Minnesota until otherwise directed by Congress or the President of the United States.

Article 6. Rules and regulations to protect the rights of persons and property among the Indians, parties to this treaty, and adapted to their condition and wants, may be prescribed and enforced in such manner as the President of Congress of the United States, from time to time shall direct."

That the lands so reserved in Article 4 of said Treaty had an area of one million one hundred twenty thousand (1,120,000) acres and on the 2nd day of March, 1867 were of the value of not less than one dollar and twenty-five cents ($1.25) per acre.

That the valuation of said land is claimed as of March 2d, 1867 for the reason that plaintiffs claim they never consented to the alleged amendment of this treaty. The

treaty was amended by the United States Senate on June 23rd 1852 and submitted to certain of plaintiff bands of In-
[fol. 21] dians on September 8, 1852, but of the original 35 Indians of plaintiff bands authorized to act in the matter, only 13 signed the treaty and none were authorized by plaintiff bands to sign such amendment. Plaintiffs therefore claim there was no other treaty than that of July 23rd, 1851 and that they were entitled to said one million one hundred and twenty thousand (1,120,000) acres of land set apart to them under said act as reservation and not having consented to the sale of the same for ten cents (10¢) an acre, or to the portion of said tract lying north of the Minnesota River (or thirty cents (30¢) an acre) under the Treaty of June 19th, 1858 as determined by Senate Resolution of June 27th, 1860, that they are entitled to the reasonable value of said land on March 3rd, 1863, that in fact said land was worth one dollar and twenty five cents ($1.25) an acre on June 27th, 1860 when a portion of it was taken from plaintiffs at thirty cents (30¢) an acre.

That plaintiffs contend they have not been paid for said land and as they have not received a report from the Auditor of the Interior Department as called for by them they have no means of knowing just what, if anything, they actually received for said lands and therefore for the purpose of this petition and unless other proof to the contrary is obtained from the said Interior Department or less payment to them, will agree that they received the following sums under said Act of July 23rd, 1851, as amended and under the Act of July 31st, 1854 and June 19th, 1858 and March 3rd, 1863, for said reservation, to wit

[fol. 22] 1,120,000 acres at 10 cents per acre	$112,000.00
560,000 acres at 30 cents per acre	170,880.00
Five-sevenths of proceeds of remaining lands consisting of 508,153.67 acres sold under Act March 3rd, 1863 at $1.31 an acre	582,217.35
A total of	$865,097.35
That the total value of their said reservation was	$1,400,000.00
Paid them as above under said acts and sales	775,097.35
Leaving balance due plaintiffs of	$624,902.65

That the above figures of $552,217.35 are taken from Senate Documents 67 and 68 and are arrived at as follows:

The total acreage of Minnesota lands sold for plaintiff bands and the Santee Sioux, that is land within the boundaries of the reservation confirmed in said Indians by the President and as originally set apart for them under the Act of July 23rd, 1851, was five hundred ninety thousand one hundred fifty three and sixty seven hundredths (590,153.67) acres being seven hundred twenty one thousand one hundred seventy two and sixty five hundredths (721,172.65) total acreage sold in Minnesota and Dakota less Dakota lands (not a part of said reservation under) Act of July 23rd, 1851, amounting to one hundred thirty one thousand eighteen and ninety eight hundredths (131,018.98) acres. (Senate Document 67, page 31) From the total amount received for all of said lands which was nine hundred forty four thousand eight hundred ten dollars and seventy eight cents ($944,810.78) it will be seen that the average price received for said lands so sold was one dollar and thirty one cents ($1.31) an acre making the total for said Minnesota lands involved in this count of five hundred ninety thousand one hundred fifty three and sixty seven hundredths (590,153.67) acres, seven hundred seventy three thousand one hundred and four dollars and thirty cents ($773,104.30) which belonged to plaintiff and the Santees. As the most liberal proportion ever given the Santees in settlement for lands sold by defendant was two sevenths, the balance received by plaintiffs according to the defendants in said Senate Documents 67 and 68, was said sum of five hundred fifty two thousand two hundred seventeen dollars and thirty five cents ($552,217.35) added to which the said sum received for the acreage sold at ten cents (10c.) an acre and thirty cents (30c.) an acre, makes the total of seven hundred thirty five thousand ninety seven dollars and thirty five cents ($735,097.35) paid plaintiffs and leaves a balance due them for said one million one hundred twenty thousand acres (1,120,000) at the price of one dollar and twenty five cents ($1.25), of six hundred sixty four thousand nine hundred and two dollars and sixty five cents ($664,902.65), which plaintiffs claim due unless a greater amount is found owing them when the Auditor's report is finally received.

[fol. 24] That said lands were of the value of not less than one dollar and twenty five cents ($1.25) an acre on March 3rd, 1867.

That the matters involved in this count are not res adjudicata; that no claim for moneys due because of the violation of said treaty of July 23, 1851, so far as the lands covered by said reservations are concerned has ever been made by plaintiff in this or any other court; that in equity they are entitled to the amount herein asked.

That because of the violation of said Treaty of July 23rd, 1851, under which the United States took said reserved lands to itself and deprived the petitioners of the same, there is due plaintiffs by the United States at this time the sum of six hundred sixty four thousand nine hundred twenty dollars and sixty five cents ($664,920.65) and interest thereon at the rate of five per cent per annum from and since March 3rd, 1867.

Four

That at the time of making of the said Treaty of July 23rd, 1851, set forth in the second three of this petition, the petitioners did not understand nor in fact knowingly agree that the said annual interest payments therein provided for should be in full payment for both "principal and interest" but understood and believed that they had in fact agreed that the principal sum to remain in trust with the United States, and five per cent interest thereon to be paid, annually, to the Indians for the period of fifty years commencing the first day of July, 1852, and that [fol. 25] at the end of said fifty years period the principal sum would be payable to said Indians. That the fact as to said Treaty was framed so as to secure to the Government of said Indians to said great tract of land, and Treaty was thereby consummated, and relied on by said Indians.

Nothing in this [illegible] shall be construed as [illegible] in the [illegible] Sioux and Wahpeton Bands of Dakota or Sioux Indians of [illegible] 23 [illegible] and therefore is not res adjudicata.

The matter of the [illegible] and misrepresentations of said treaty has never been heard by the court, has never been [illegible] materially. There has never

been conferred upon this court heretofore the right to try the equitable rights of plaintiffs in respect to this Treaty or any other, hence the matter herein involved cannot possibly be res adjudicata; neither can that line of cases (of which Otoe and Missouri Indians vs. United States, 52 C. Cls. 421 is one) which hold that this court has no jurisdiction to go behind the stipulations of a treaty and review the action of the Government upon the ground that the Indians have been treated unfairly or have received an inadequate consideration for their lands, be considered of weight in the present action, which is pending under a jurisdictional act giving this court the right to consider the equitable rights of plaintiffs under this and the other treaties herein involved.

Plaintiffs allege that this court has the right in this action to consider the unfairness, inequity and unconscionableness [illegible] of the Treaty of July 2nd, 1851, that it was given such right under the jurisdictional act hereinbefore set forth.

That the retention of the principal sum due plaintiffs under said act was unjust; that the wording of the act did not make it clear to plaintiffs that they were not to receive both principal and interest under the said act and that they were misled and thus heretofore delayed in obtaining their just rights under the provisions of said Act.

That no part of the matter of money or items involved in [illegible] of this petition are herein involved although both the matters in dispute in this and [illegible] arose out of the same Act, that of July 2nd, 1851. That the matter in dispute in [illegible] involves only the reservation in said act set apart to plaintiffs and consisting of one million one hundred and twenty-thousand (1,120,000) acres. That in the act plaintiffs and the Santee Sioux sold seventeen million seven hundred seventy thousand (17,770,000) acres of land to the United States for ten cents (10¢) an acre. That these plaintiffs after selling said land for ten cents (10¢) an acre most of which is now worth from one hundred dollars ($100) to four hundred dollars ($400) an acre, were unjustly and unfairly and inequitably defeated in the collection of the principal sum of one million three hundred twenty thousand ($1,320,000) dollars.

That both principal sum and interest was one and the same sum, making the Treaty difficult for plaintiffs to understand and that they understood they were to receive [fol 27] both principal and interest on said Treaty. That said Treaty was confusing in its wording in that it stated that said sum of one million three hundred sixty thousand ($1,360,000) dollars was to remain in trust with the United States and five per cent (5%) per annum interest was to be paid annually to said Indians for the period of fifty years counting from the first day of July, 1852, etc. That though the Treaty said this was to be in full payment, it was confusing in that it did not say that said sum of one million three hundred sixty thousand ($1,360,000) dollars was to be paid in fifty annual installments of twenty-seven thousand two hundred ($27,200) dollars, without interest. Plaintiffs allege that the framers of that Treaty drew said treaty as they did in order to confuse them and defeat them in their rights; that no white man or body of men would have sold said land for 70 cents (70¢) an acre and for 5% (5¢) to be payable in interest only and interest for a limited period.

The statement to the Indians that said principal sum was to remain in trust with the United States, naturally meant, they allege that if it was to remain in trust with the United States it was to be at present in trust with the United States for them, plaintiffs, and that remaining in trust with the United States for them it should now be paid to them.

Therefore in equity and good conscience the petitioners herein are entitled to receive from the United States said balance of principal under said Treaty, to wit: the sum of one million three hundred sixty thousand ($1,360,000) dollars [fol 28] less together with interest at five per cent per annum from and since July 1st, 1852, the date when said balance of principal became due and payable to petitioners.

Five

That the Act of Congress of March 3rd, 1863, 12 Stat L. 819, provided for the sale of the Sioux Indians lands in Minnesota and Dakota and for payment of the proceeds thereof to the Indians entitled thereto. That there was realized from the sale of seven hundred twenty one thousand one hundred seventy two and sixty five hundredths

acres (721,172.65) of said lands the sum of nine hundred forty four thousand eight hundred and ten dollars and seventy eight cents ($944,810.78) prior to the year 1893.

That all of said lands in fact belonged to the Sisseton and Wahpeton bands of Sioux Indians and they were entitled to the entire proceeds thereof but the United States erroneously paid the major portion thereof, to wit, approximately the sum of five hundred thousand dollars ($500,000) to the Medawakanton and Wahpakoota bands of Sioux Indians, all against the will and without the consent of the said Sisseton and Wahpeton bands of Sioux Indians.

That the matter herein involved was set in amount of money thus wrongfully paid to said Medawakanton and Wahpakoota or Santee bands of Sioux Indians because the audit of such accounts as would show those items which the Department of the Interior agreed to furnish plaintiffs [fol. 26] has not yet been supplied to them and therefore they are at a loss to state with more definiteness and exactness the amount so wrongfully paid to said last mentioned bands of Santee Sioux the said sums of money belonging to plaintiffs.

That the matter herein involved was not in dispute in the former case of these plaintiffs against the United States (28 Ct. Cls. 261) and therefore the matters involved in this count are not res adjudicata.

That no matter what amount was paid by the United States Government to said Medawakanton and Wahpakoota bands of Indians for the lands sold under the Act of March 3, 1863, that amount is due plaintiffs for the reason that plaintiffs were the rightful owners of the lands so sold. That in justice and equity they should have repaid to them the amount paid by defendant to the Medawakantons and Wahpakootas.

Wherefore the petitioners are entitled to recover from the United States upon this count the sum of five hundred thousand dollars ($500,000) and interest at five per cent per annum from January 1st, 1893.

Six

That lying north of the north shores of Devils Lake in the State of North Dakota and south of the Canadian boundary

tion is a tract of land approximately three million (3,000,000) acres in area claimed by the Sioux Indians and which has never been ceded to the United States by said Sioux [fol. 20] Indians and no compensation has ever been paid to said Indians therefor.

That in contravention of the rights of said Indians as owners of said three million (3,000,000) acres of land, the United States subsequent to March 3rd, 1863 opened said territory to settlement by the Whites and so disposed of the same, thereby depriving the said Indians of said territory.

Plaintiffs contend that they owned all of the above land, statements to the contrary made in treaties or otherwise notwithstanding.

They further contend the statement in the Treaty of September 20th, 1872 which was included in said Treaty after the description of the land ceded containing eleven million (11,000,000) acres but mentioned therein as about eight million (8,000,000) acres, which statement read as follows: "as well as all lands in the Territory of Dakota to which they have title or interest" was inserted without their knowledge or consent.

They further contend that said statement was made without consideration, that it is not binding on them, that they sold only the eight million (8,000,000) mentioned and no other land than that mentioned and described thereon was ceded under said treaty either intentionally or otherwise; that the treaty of September 20th, 1872 was not intended to cede more than the eight million (8,000,000) acres the commissioners represented the tract contained and that the including of any other land was an afterthought and the statement above quoted intending to take from the Indians any [fol. 21] other rights of title to any other land in which they had an interest was added without their knowledge or consent and is therefore not valid or binding.

The plaintiffs state they owned the land in this count above mentioned and described, north of Devils Lake aggregating three million (3,000,000) acres or more and that they have never been paid therefor.

Plaintiffs further contend as in Count Two of this amended petition fully set forth that the said treaty and amendment under which it is alleged the tract of land involved in this count was ceded, was not knowingly signed

by them; that many of those who signed it were forced to sign it and that it was executed against their will, without their consent and by force and duress. That the matter in this count claimed was never before this court for consideration and is a legal and equitable claim against defendant.

That the value of said land on March 3rd, 1863, was one dollar and twenty five cents ($1.25) per acre.

Wherefore, the petitioners are entitled to recover from the United States for said tract of land in this paragraph described the sum of three million seven hundred fifty thousand ($3,750,000) dollars and interest.

Seven

That under the agreement of December 12th, 1889, between the Sisseton and Wahpeton of the Lake Traverse Reservation and the United States, ratified by Congress, [fol. 32] March 3rd, 1891 (26 Stat. L. 1026) there was ceded to the United States a tract of land containing six hundred seventy nine thousand nine hundred twenty (679,920) acres at a valuation of one million six hundred ninety one thousand eight hundred ($1,691,800) dollars which amount was appropriated and placed to the credit of said Indians and drawing interest at five per cent per annum.

That in 1897 the Hon. Secretary of the Interior erroneously charged the figures above mentioned and credited said Indians with only the sum of one million five hundred twenty two thousand one hundred sixty four and fifteen hundredths ($1,522,164.15) dollars for said tract, thereby erroneously withholding from the said Indians the sum of one hundred seventy seven thousand six hundred thirty five and eighty five hundredths ($177,635.85) dollars no part of which has been paid to said Indians and to which they are entitled.

That prior to 1897 interest payments had been made by the United States to said Indians based upon the correct principal amount above specified but the Hon. Secretary of the Interior in the said year 1897 erroneously charged against said Indians the sum of fifty-eight thousand four hundred twelve dollars and ninety eight cents ($58,412.98) under the erroneous assumption that said Indians had received that amount, in interest to date, in excess of what

they were entitled to under said agreement of December 12th, 1889.

In explanation of this error and in support of this count, [fol. 33] plaintiffs claim that under Article I of the agreement of September 12, 1889 all of the Sisseton and Wahpeton Sioux ceded their unallotted lands of the Lake Traverse reservation after each person to said agreement had received one hundred sixty (160) acres.

The agreement was ratified by Congress March 3, 1891 and by that act all unallotted lands were opened to settlement excepting Sections 16 and 36 which were made State School Lands. Also a part of the military reservation of Fort Sisseton that was within the reservation was given to the state. There were on the rolls of the Sisseton Agency at that time (1889) 1,487 persons but by instructions given the allotting agent the roll was increased and more allotments made than there were parties to the agreement, although protests were regularly and properly made by the Sisseton and Wahpeton Sioux by chiefs and headmen. In ratifying the agreement Congress appropriated one million six hundred ninety-nine thousand eight hundred ($1,699,800.00) dollars in payment of the lands ceded and provided that said amount be placed to the credit of the Sisseton and Wahpeton Sioux in the United States Treasury and drawn with interest at the rate of five per cent. In 1897 it was found that because of the extra allotments made which were unauthorized by those who ought to know who belonged on the rolls, the plaintiff Indians themselves the amount placed to the credit of the Indians ($1,699,800) was more than was required to pay for the lands opened to settlement under the proclamation of the President, April [fol. 34] 15, 1892. The account of the Sisseton and Wahpeton Sioux was therefore accordingly charged with one hundred seventy-seven thousand six hundred thirty-two dollars and eighty-five cents ($177,632.85) as above stated, which was deducted from the trust funds together with fifty-eight thousand four hundred twelve dollars and ninety-eight cents ($58,412.98) on the interest account, so that the plaintiff Indians were not paid for the amount of land which they actually ceded and if the United States government took upon itself the right to make allotments to Indians not on the rolls of the plaintiff bands and not entitled

to be on the rolls, (as it has always been customary to allow the Indians to decide who should be placed on their own rolls) then the United States government should now pay the difference still due and owing the Indians, that is, the sum of two hundred thirty six thousand and forty-eight dollars and eighty three cents ($236,048.83) with interest at five per cent from and since 1897. It would have required all of the amount appropriated to have paid for the land ceded had not the school sections, military reservation and additional allotments to parties not entitled, that is, to the state and the several individual Indians without the consent of the plaintiffs. Protests have been filed at different times in connection with this transaction and the rolls of Inspector Major James McLaughlin, made in 1903 shows that the enrolment for allotment of the several persons not parties to the treaty of 1855 were stricken from the rolls.

[fol. 35] The matter herein set forth as the basis for this claim was not tried out in the former case (206 U. S. 90) as there never was mention made of the manner of the error made by the Interior Department. It was a mistake for which the defendant is and should be responsible, not plaintiff bands who reside on the Lake Traverse Reservation. It has been held time and time again that the Indians and they alone are responsible for the naming of those on their rolls. They are the judges of who should be on the rolls and to prove that they were correct in objecting to the placing of the Indians on the rolls in this instance requires them to lose many thousands of dollars. Which Indians Major James McLaughlin, representing the defendant afterwards had had no right on the rolls of the Sisseton and Wahpeton bands residing on the Lake Traverse Reservation and these names so erroneously placed on the rolls were stricken off.

This is an equitable and a legal claim and we ask that the court consider it upon its merits irrespective of any claim that may be made as to its having been previously under consideration by this court. Under the jurisdictional act in the former cases of these plaintiffs against the United States, this court had the right only to act on matters of a strictly legal nature and not, as in this case on the equitable rights of plaintiffs.

Whereupon petitioners are entitled to recover on this count for and in behalf of the Indians of the Lake Traverse Reservation from the United States the sum of Two hundred [fol. 36] dred thirty six thousand forty-eight dollars and eighty three cents ($236,048.83) with interest at five per cent per annum from and since the year 1897.

Eight

That prior to the year 1889 General J. B. Sanborn had been empowered by individual powers of attorney by a number of scouts and soldiers of the four bands of Sioux or Dakota Indians in presenting their claims against the United States for their shares of the annuities confiscated by Act of Congress February 16th, 1863, and reserved pay for his services out of the amount recovered, on the basis of a commission of ten per cent as agreed with said individual scouts and soldiers.

That at the time the unallotted lands of the Sisseton and Wahpeton Sioux Indians of the Lake Traverse Reservation were ceded to the United States by the agreement of December 12th, 1889, it was stipulated by said Indians and agreed to by the United States that the lands so ceded could not be opened to settlement until there was paid to all the said Indians of said reservation their shares of the annuities confiscated by said Act of Congress of February 16th, 1863. That by reason of this stipulation, with which General J. B. Sanborn had no connection whatever, payment was made by the United States to said Indians of the Lake Traverse Reservation in 1891, whereupon the said General J. B. Sanborn made claim for the commissions thereon which claim was contested and in the year 1895 the [fol. 37] Court of Claims found against said Sanborn thereon and denied his right to recover.

That notwithstanding said decision of the Court of Claims there was wrongfully paid by the department in September, 1897, out of funds so recovered, to said Sanborn the sum of forty one thousand six hundred ($41,600) dollars.

That defendant through Congress had the right to pay General Sanborn for any services which he may have performed, but had no right to deduct said sum so paid him

from the funds belonging to those of plaintiff bands residing on the Lake Traverse Reservation from which funds said money was taken.

That General Sanborn was in no manner whatever responsible for the payment of any money to said soldiers and scouts, but that the members of the plaintiff bands of Indians residing on the said reservation were entirely responsible themselves for the payment of said money to said scouts and soldiers and they maintain that because of the misappropriation of their funds in the manner shown, they should be repaid said money at this time.

That this court hold that such money should not be withheld from the said plaintiffs and paid General Sanborn and that Congress had no right to order said money taken from the funds of the plaintiffs.

That said funds by right, and in justice and equity are still due and owing plaintiffs of the Lake Traverse Reservation under the various treaties from and through which said fund was created and because of this plaintiffs allege [fol 28] this is a just and proper claim to be considered under the jurisdictional act by authority of which this action was commenced and is pending; that this claim has not heretofore been before this court for repayment.

That the United States is therefore indebted to the petitioners of the Lake Traverse Reservation on this count for the said sum of forty one thousand six hundred dollars ($41,600) *dollars* together with interest at five per cent per annum from and since September, 1867.

Nine

That by the Treaty of February 19th, 1867, between the Sisseton and Wahpeton Bands of Sioux Indians and the United States (15 Stat. at Large 505) ratified April 15th, 1867, it was agreed by Article 4 thereof as follows:

"Article 4. It is further agreed that a reservation be set apart for all other of said bands that were not sent to the Crow Creek reservation, and also for the Cut Head Bands of Yanktonais Sioux, a reservation bounded as follows, viz: Beginning at the most easterly point of Devils Lake, thence along the waters of said lake to the most westerly point of

the same; thence on a direct line to the nearest point on the Sheyenne River; thence down said river to a point opposite [fol. 29] the lower end of Aspen Island and thence on a direct line to the place of beginning."

That the United States caused a survey to be made in the year 1875 setting off said reservation but in making said survey a mistake was made whereby an area of sixty four thousand (64,000) acres was off the western end of such reservation which sixty four thousand (64,000) acres the United States opened to settlement by the whites and thereby totally deprived the members of the said Sisseton and Wahpeton Bands of Sioux Indians resident on said reservation of said sixty four thousand (64,000) acres of land without the consent of said Indians and without any compensation.

That the value of said land at the time and its value on March 3rd, 1863, was at least the sum of two dollars and fifty cents ($2.50) per acre.

That by Act of Congress approved June 30, 1882, (22 Stats., 168) the United States appropriated the sum of eighty thousand (80,000) dollars to pay said Indians for such excluded lands but instead of paying said Indians in cash "payment was made to the Indians on this claim in agricultural implements, some wretchedly poor work done on log cabins, some cows of inferior grades, and some teams of broncbos, which the latter especially, were of little benefit to them and which they accepted under protest and when finally prevailed upon to accept said issue, it was with the distinct understanding, as alleged by them, that it was not to be considered as full payment for the lands ex- [fol. 30] cluded from their reservation by said erroneous survey." (House of Representatives, Doc. No. 95, 57th Congress, 1st Session, p. 11).

Under the alleged agreement of November 2nd, 1867 with the plaintiff bands of Indians who live on Devils Lake Indian Reservation they agreed to accept a certain sum for their rights now herein set forth. This treaty was amended by the Senate and ratified by the act of April 27th, 1904, but the treaty as amended was never accepted or approved by the said plaintiff bands or any of them.

Therefore there was no treaty binding on these Indians and defeating them of their rights to pay for the sixty four

thousand (64,000) acres in question originally as they claim taken from them intentionally and not in error.

Under the act of April 21th, 1904, without the approval of plaintiffs on the Devils Lake Reservation, who are the only ones this particular count refers to, their unallotted lands on the Devils Lake Indian Reservation were sold. These Indians agreed to sell these lands for a certain fixed sum and to settle likewise for an agreed amount for their claim to this sixty four thousand (64,000) acres of land and a wood claim set forth in Count ten.

The Indians submitted their Treaty to Congress for approval and were told by the Government Inspector that he was their friend and no word of said agreement would be changed without the agreement coming back to them for their approval.

[fol 41] Let us substantiate this statement. Refer for a moment to Document No. 92, House of Representatives, 57th Congress, 1st Session, on page 24, just before the close of the morning session, Major McLaughlin said:

"And no sentence or single word can be changed in the agreement forwarded and it remain valid unless returned to the Indians for their concurrence."

However, their lands were sold and these Indians instead of receiving pay for the lands and the matter involved in this count and the wood claim, received only what their lands sold for.

That was not the agreement. It was shown by and from Document No. 92 that the lands sold under the alleged Treaty of April 27th, 1904 could all be sold for five (85) dollars an acre. They were sold for much less, the expenses of sale deducted and the balance paid the Indians. Hence this was merely a sale of their lands without treaty or agreement so far as they are concerned as the agreement was not an agreement, not having been consented to by these plaintiffs but merely an arrangement made by the defendant to sell the lands and settle two disputed claims.

The Indians received as much from the sale of said lands as they would under the Treaty, but this claim is a just and legal claim as there was no agreement.

If the defendant will allow the equitable claims of the Indians hereinbefore set forth and if it does equity to plain[fol. 42] tiffs, then this count is not an equitable, but purely a legal claim and we are willing to withdraw it, but as the jurisdictional act gives plaintiffs the right to recover under and upon all its legal and equitable claims, this item is included.

The Act of April 27th, 1904 provided as follows:

"Article IV. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Devils Lake Reservation, North Dakota of any benefits to which they are entitled under the existing treaties or agreements not inconsistent with the provisions of this agreement."

So it will be seen these plaintiffs still have their original rights to remuneration and payment for said lands.

Plaintiffs objected to this item claim defendant attempted to settle for the sixty four thousand (64,000) acres in question by paying them money already belonging to them, plaintiffs, and that for the reasons stated they have not been paid for those lands, there being no agreement properly consented to by them for such settlement.

That if they were to receive merely what the lands were worth, less expenses they should have received at least five dollars ($5) an acre therefor instead of about two dollars and fifty cents ($2.50).

The Indians ask two dollars and fifty cents ($2.50) an acre for this land less twenty thousand dollars ($20,000) [fol. 43] which they agree was the value of material, stock and work received on the claim heretofore.

As to proof of the value of these lands they respectfully refer to said House Document No. 95 in part as follows:

"The Indians never ceded their claim to said tract (meaning the 64,000 acres in question) until included in the agreement herewith transmitted, and the total price allowed them in consideration therefor is at the moderate rate of $2.50 per acre, with $1.25 per acre deducted therefrom, which has already been paid to them on this claim through the legislation above referred to."

The one dollar and twenty five cents ($1.25) which the Inspector states was paid, was not paid but this was paid in worthless material, stock and work which plaintiffs allege was worth not to exceed twenty thousand ($20,000) dollars.

That the value to the said Indians of the things paid to them as above enumerated was not in excess of twenty thousand ($20,000) dollars, and there is still due and owing to the said Indians of the said Devils Lake Reservation on said excluded tract the sum of one hundred forty thousand ($140,000) dollars together with interest at five per cent per annum from and since the 19th day of February, 1867.

Ten

That between the years 1870 and 1890 a military post [fol. 44] was maintained by the United States upon the Devils Lake Reservation above described and during said time there was taken from said reservation by the armies of the United States great quantities of wood and timber and in addition thereto great quantities of wood and timber on said reservation were wasted or destroyed by said armies and no compensation was ever made therefor to the Indians owning said reservation.

Defendant contends that this item was settled under the so-called Treaty of November 2nd 1901 as amended by the Senate and ratified by the Act of April 27th, 1904

Plaintiffs (residing on the Devils Lake Indian Reservation, to whom this claim applies) allege that there was no consent to the amended treaty and that it was never ratified by them and therefore was no treaty.

That for all the reasons set forth fully under Count nine of this amended petition hereby restated and realleged, their claim for such wood and timber is still a valid legal claim against defendant

That said wood and timber so taken from those lands of plaintiff Indians was of the value of not less than three hundred thousand ($300,000) dollars.

Wherefore the Indians of said Devils Lake Reservation have been damaged by and are entitled to recover from the United States in the sum of three hundred thousand ($300,000) dollars together with interest at five per cent per annum from and since on or about October 1st, 1890.

[fol. 45] By reason of the Claims hereinbefore set forth, your petitioners pray the Judgment of this Honorable Court and that they have Judgment against the United States for the total sum of twenty million three hundred ninety-four thousand nine hundred and fifty-one dollars and forty-eight cents ($20,394,951.48), together with interest as in said petition alleged.

Dated this 23rd day of March, A. D. 1920.

Flynn & Traynor, Attorneys for Petitioners. Mark V. Traynor, of Counsel.

Residence and Postoffice address: Devils Lake, North Dakota.

Duly sworn to by Edward F. Flynn. Jurat omitted in printing.

[fol. 46] III. Demurrer, Plea, Etc.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 31.

IV. Argument and Submission

On January 23, 1923, this case was argued and submitted on merits by Mr. Edward F. Flynn, for the plaintiffs, and by Mr. George T. Stormont, for the defendant.

[fol. 47] V. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Booth, J.** Entered April 23, 1923

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

This suit was filed on March 17, 1917, pursuant to a special jurisdictional act of Congress approved April 11,

1916, entitled "An act conferring jurisdiction on the Court of Claims to hear, determine, and render judgment in claims of the Sisseton and Wahpeton bands of Sioux Indians against the United States," 39 Stat. 47, which act provides:

"That all claims of whatsoever nature which the Sisseton and Wahpeton bands of Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all claims of said bands against the United States and also any legal or equitable defense, set-off, or counter-claim which the United States may have against said Sisseton and Wahpeton bands of Sioux Indians, and to enter judgment, and in determining the amount to be entered hereon the court shall deduct from any sums found due said Sisseton and Wahpeton bands of Sioux Indians any and all gratuities paid said bands or individual members thereof subsequent to March third, eighteen hundred and sixty-three: Provided, That in determining the amount to be entered hereon, the value of the land involved shall not exceed the value of such land on March third, eighteen hundred and sixty-three. If any such question is submitted to said court it shall settle the rights, both legal and equitable, of said bands of Indians and the United States, notwithstanding lapse of time or statute of limitations. Such action in the Court of Claims shall be presented by a single petition, to be filed within one year after the passage of this Act, making the United States a party defendant which shall set forth all the facts on which the said bands of Indians base their claims for recovery and the said petition may be verified by the agent or authorized attorney or attorneys of said bands, to be selected by said bands and employed under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, in accordance with the provisions of existing law, upon information or belief as to the existence of such facts, and no other statements or verifications shall be necessary. Official letters, papers, reports, and public records, or certified copies thereof, may be used as evidence."

II

Prior to July 23, 1851, the eastern, or Minnesota, Sioux Indians, consisting of four bands known as the Mdewakanton, Wahpakoota, Sisseton, and Wahpeton Bands, lived generally along the upper Mississippi River, the greater part of them on the west side of the river, but some of the Mdewakantons and Wahpatootas on the east side. At an earlier period these Indians had their homes around or in the vicinity of Mille Lacs north and somewhat west of the site of the present city of Minneapolis, where they were encountered by the first white explorers of those regions. The four bands ranged generally in the northward, the Sisseton and Wahpeton Bands ranging over into the Territory of Dakota, and the Mdewakanton and Wahpakoota Bands to the Big Sioux River, which was then the dividing line between them and the Yankton Sioux on the west of them.

The Minnesota Sioux were commonly referred to as Mdewakantons, but later spoke of the four bands as one band. The Sissetons and Wahpetons lived and hunted together, and the Mdewakantons and Wahpakoota lived together practically as one band. The number of the Mdewakantons and Wahpakoota combined was only one-third the full that of the Sissetons and Wahpetons.

These Minnesota Sioux were known to the Government as the Sioux of the Mississippi, to distinguish them from the Teton, Yankton, and Yanktonai Sioux on the west, who lived along the Missouri River and were known as the Sioux of the Missouri.

The Mdewakanton Indians whose home was Mille Lacs were designated Isanyati by the early explorers, derived from the Indian name of that lake, and all of the Minnesota Sioux were often designated as Isanyati by the Sioux of the Missouri. This name, Isanyati, has later corrupted into "Santee," and applied exclusively to the Mdewakantons and Wahpakootas.

III

In 1851 the four bands of Minnesota Sioux for certain considerations, ceded to the United States all of their lands in the Territory of Minnesota and the State of Iowa, the Sisseton and Wahpeton Bands by the treaty of July 23, 1851, 10 Stat. 949, and the Mdewakanton and Wahpakoota Bands by the treaty of August 5, 1851, 10 Stat. 954.

provision, the Senate, by resolution of June 27, 1860, 12 Stat. 1042, declared that said bands had a just and valid right and title to the whole of said reservations, respectively, and that they should be allowed the sum of 30 cents per acre for the portions thereof lying on the north side of the river. The portion of plaintiff's said reservation lying on the north side of the river consisted of 569,600 acres, for which payment was made to plaintiff, at the rate of said 30 cents per acre, in the sum of $170,880, which payment was provided for by act of March 2, 1861, 12 Stat. 237.

Subsequently plaintiff bands received from the sale of the lands of said reservation lying on the south side of the Minnesota River under the act of March 3, 1863, 12 Stat. 819, the sum of $647,457.93, making a total of $818,337.93 received by them for and on account of the lands of said reservation.

The entire reservation comprised 1,120,000 acres of land. The value of this land on March 3, 1863, was $1.25 per acre, or total of $1,400,000.

VI

In August, 1862, there was an outbreak of the Sioux Indians in Minnesota consisting of the plaintiff bands, known as the Upper Sioux, and the Medawakanton and Wahpakoota Bands, known as the Lower Sioux, during which outbreak a large number of white settlers were massacred and a great amount of property destroyed. Just prior to this outbreak the plaintiff bands, the Sissetons and Wahpetons, had a total population of 4,026 men, women, and children; and the Medawakanton and Wahpakoota Bands had a population of 2,225. By the spring of 1863, as a result of the military operations against said bands following this outbreak, the greater part of the Medawakanton and Wahpakoota Bands, and a few of the Sisseton and Wahpetons had been captured or had surrendered and were held as prisoners of war at Fort Snelling, Minn.

In consequence of this outbreak, Congress, by act of February 16, 1863, 12 Stat. 652, abrogated and annulled all treaties between said bands of Indians and the United

States, so far as said treaties purported to impose any [Ind. 51] future obligation on the United States, declared all lands and rights of occupancy within the State of Minnesota and all annuities and claims theretofore accorded to the said Indians to be forfeited to the United States, and provided for payment of the damages suffered by the citizens in said outbreak out of the funds in the hands of the Government belonging to said bands.

VII

In further consequence of said outbreak, and of the said act of February 16, 1863, Congress, by act of March 3, 1863, 12 Stat. 819, provided that the President should "assign and set apart for the said Sissetton, Wahpeton, Medawakanton, and Wahpatoota bands of Sioux Indians a tract of unoccupied land outside the limits of any State, sufficient in extent for the purpose, to assign to each member of said bands (who are willing to avail of the privilege of agriculture) eighty acres of good agricultural lands, the same to be well adapted to agricultural purposes," and that the several tracts of land within the reservations of said Indians on the Minnesota River should be surveyed and sold, the money from such sales to be "expended by the Secretary of the Interior for the benefit of said Indians in their new homes in the cultivating them in agricultural pursuits." It was also provided by said act that it should be lawful for the Secretary of the Interior to locate on lands of said reservations any meritorious individual Indians of said bands who exerted themselves to save the lives of the white people in said outbreak and massacre, no one of such Indians to be allowed more than 80 acres of such land.

Pursuant to the provisions of this act, a tract of land was shortly thereafter, in the spring of 1863, selected for said bands of Indians at Crow Creek on the Missouri River in Dakota Territory. At or about the time there were being held by the United States military authorities at Fort Snelling, Minn., as prisoners, a total of [text illegible] members of said four bands of Indians who had been captured or had surrendered, and some 303 others were held at Davenport, Iowa, under sentence of life imprisonment. Most of the remaining members of said bands were at this time either

fleeing from or engaged in warfare with the United States military forces. The prisoners at Fort Snelling numbered 1,489 full blood Indians and 112 half breeds. Of these Indians 1,190 of the full blood Indians were men, women, and children belonging to the Medawakanton and Wahpakoota Bands. The remaining 296 men, women, and children were Sissetons and Wahpetons, among whom were four chiefs and several headmen and influential soldiers of these tribes.

In May, 1863, these prisoners at Fort Snelling, with the exception of the half breeds and a few scouts, were removed to the said tract of land selected at Crow Creek for said bands, arriving there May 30, 1,300 in number; and on or about July 1, following, a tract of land at that point was formally set apart for said Minnesota Sioux, designated "Sioux of the Mississippi."

Military operations were continued against the hostile members of said bands until the latter part of 1864, by which time most of them were driven out of the State of Minnesota, some retreating to the west of the Missouri [fol. 32] River and joining with the Teton Sioux, and some escaping north into Canada. After the cessation of military operations against them, some of them returned eastward, and by the latter part of 1866 there were in the vicinity of Fort Wadsworth, in the eastern part of Dakota Territory, from 600 to 800 members of the Sisseton and Wahpeton Bands. An unsuccessful attempt was made by the Government to negotiate a treaty with these fragments of said bands, for the setting apart of a reservation for them and the extinguishment of their claim to lands in Dakota Territory, which claim was considered of doubtful character because of said lands also being claimed by other tribes or bands of Indians.

The greater part of the members of said plaintiff bands, after the cessation of military operations against them, gathered and settled in the vicinity of Fort Wadsworth, where with the acquiescence of the Government, they remained until the Lake Traverse and Devils Lake Reservations were set apart for said bands in 1867, as hereinafter related.

It does not appear that any material number of additional members of plaintiff bands ever went to live on the said Crow Creek Reservation set apart under the act of

March 3, 1863, or that any other lands were set apart for plaintiff bands under said act; nor does it appear how many of the members of said bands were willing to adopt the pursuit of agriculture, following said act of March 3, 1863.

VIII

One of the provisions of the said treaty of July 23, 1851, was the creation of a trust fund from the funds provided to be paid plaintiff bands for their cession of lands to the Government under said treaty, this trust fund to be held by the Government and 5 per cent interest thereon paid annually to said bands for a period of 50 years, and the payment of which interest was to be in full payment of and to extinguish said trust fund. Under the treaty as submitted to the Senate for ratification the amount of this trust fund would have been $1,360,000; but under the treaty as amended by the Senate and adopted by the parties thereto, it was increased to $1,472,000, by the addition of the 10 cents per acre provided for the lands of their said reservation on the Minnesota River.

Prior to the said Sioux outbreak of 1862, and the said act of February 16, 1863, annulling all treaties between the Government and plaintiff bands and forfeiting all annuities and claims thereunder accorded said Indians, the Government had accounted to said bands for the interest on said trust fund; and notwithstanding the forfeiture of their rights by said act of February 16, 1863, the Government has, under subsequent acts of Congress, also accounted to said Indians for the interest on said trust fund for the remainder of said 50 year period, less the amounts paid citizens for damages sustained by them by reason of said outbreak. No payment has been made by the Government to plaintiff bands for or on account of the principal of said trust fund.

It appears from the evidence that some of the members of plaintiff bands did not understand, at the time of the [61] making of said treaty, that the payment of interest on said trust fund for 50 years was to be in full payment of the principal thereof, but understood that at the end of said 50 year period the principal was to be paid to said bands, but it does not appear that the provision of the

treaty on this point was not understood by the chiefs and headmen who represented said bands in the making of the treaty.

IX

The said act of March 3, 1863, 12 Stat. 819, provided for the sale of the lands of the former reservations of the plaintiff bands and the Medawakanton and Wahpakoota Bands on the south side of the Minnesota River, forfeited by said bands under the said act of February 16, 1863, and the investment of the proceeds thereof by the Secretary of the Interior for the benefit of said Indians in establishing them in agricultural pursuits in their new homes to be provided for them under said act of March 3, 1863.

Pursuant to this provision of said act the lands of these two reservations were sold by the Government, beginning in 1863 and continuing on through a long period of time, and the proceeds applied for the benefit of said Indians. The proceeds from the sale of these lands amounted to $[illegible] 08/71. The first $[illegible] of these proceeds were expended solely for the benefit of the four bands of said Indians prior to July 15, 1870, and the remainder of said proceeds has been disbursed for and on account of the plaintiff bands and the Medawakanton and Wahpakoota Bands in accordance with the following provision in the act of July 15, 1870, 16 Stat. 361, relating thereto:

"That said proceeds shall be distributed and paid over [illegible] to the said Indians in proportion to their numbers under the direction of the Secretary of the Interior, and in accordance with existing law: Provided, That this proviso shall apply only to the funds to be hereafter distributed."

It does not appear what part of the said $[illegible] of said proceeds expended solely for said four bands prior to July 15, 1870, was expended either for the benefit of plaintiff bands or for the benefit of the Medawakanton and Wahpakoota Bands.

X

By Article II of the treaty of February 19, 1867, between plaintiff bands and the United States, 15 Stat. 505, said bands ceded to the United States the right to construct

wagon roads, railroads, mail stations, telegraph lines, and other public improvements over and across "the lands claimed by said bands," said lands being described as bounded on the east by the west treaty line of 1851 and the Red River of the North—that is, by a line running northeasterly from Lake Kamposka to the head of Lake Traverse and thence northward along the western boundary of Minnesota and down the Red River of the North to the mouth of Goose River; on the north by Goose River and a line running from its source by the most westerly point of Devils Lake to the Chief's Bluff, at the head of James River; on the west by the James River, down to the mouth (or 50) of Moccasin River; and on the south by a direct line from the mouth of Moccasin River eastward to Lake Kamposka, the point of beginning. And in consideration of this cession by said bands and "of the faithful and important services said to have been rendered by the friendly bands of Sisseton and Wahpeton Sioux" represented in the making of said treaty, and "also in consideration of the confiscation of all their annuities, reservations and improvements," it was provided that there should be set apart as a permanent reservation for the members of said bands who had theretofore surrendered to the authorities of the Government and were not sent to the Crow Creek Reservation, and for the members of said bands who were released from prison in 1866, a portion of the southeastern part of the tract of land described in said Article II of the treaty as claimed by plaintiff bands. This reservation lay to the west and southwest of Lake Traverse and became known as Lake Traverse Reservation. There was also provided that there should be set aside for all other members of said bands who were not sent to the Crow Creek Reservation, and also for the Cut Head Bands of Yanktonais Sioux, a reservation on the south shore of Devils Lake, in the northwestern part of said tract of land described in Article II of said treaty, which reservation became known as Devils Lake Reservation.

It was further provided that said reservations should be apportioned among said Indians in tracts of 160 acres to each head of a family and to each single person over 21 years of age who desired to locate thereon permanently and cultivate the soil as a means of subsistence, and that every person who received such an allotment and occupied and

cultivated a portion of it for five consecutive years should thereafter be entitled to receive a patent for it as soon as he should have 50 acres of it fenced, ploughed, and in crop.

XI

By act of June 7, 1872, 17 Stat. 281, the Secretary of the Interior was directed to examine and report to Congress what title or interest plaintiff bands had to any portion of the land mentioned and particularly described in the second article of the said treaty of February 19, 1867, by virtue of any law or treaty whatsoever, excepting such rights as were secured to them by the third and fourth articles of said treaty setting apart the said Lake Traverse and Devils Lake Reservations for them; and also to examine and report whether any, and if any, what, compensation ought, in justice and equity, to be made to said bands of Indians respectively, for the extinguishment of whatever title they may (might) have to said lands."

Under authority of this act the Secretary of the Interior appointed a commission which was instructed to proceed to the reservation of said Indians and there, and from the record, make a full investigation of the Indian title, and if this commission found such title to be valid and complete, to negotiate for the relinquishment of the same upon terms of once favorable to the Government and just to the Indians.

On October 3, 1872, the commission, after investigation of the questions submitted to it, reported that prior to the said treaty of February 19, 1867, the title of plaintiff bands to the tract of land in question was doubtful, owing to the fact that up to some time prior to that treaty other bands (of Sioux Indians claimed a common interest in said lands, but that the United States had by that treaty recognized the Indian title to this tract of land as being in plaintiff bands and was thereby estopped from later denying their title to it. On the question of compensation the commission reported that it estimated said tract of land to have an area of over 8,000,000 acres, and that the value of the right and title of plaintiff bands therein ought to be fixed at the sum of $800,000, though the Indians, on the one hand, asked $2,000,000 more than this sum, and one of the commissioners, on the other hand, was of the opinion that

$500,000 was more than ought to be allowed under the circumstances.

And with its report the commission submitted a proposed treaty which it had negotiated with plaintiff bands under date of September 20, 1872 (Kappler's Ind. Laws and Treaties, Vol. II, p. 1067), under the terms of which said bands were to "cede, sell, and relinquish to the United States all their right, title, and interest in and to" the tract of land in question, "as well as all lands in the Territory of Dakota to which they have (had) title or interest," except the said Lake Traverse and Devils Lake Reservations set apart by the treaty of February 19, 1867. The principal, but not the only, consideration for the cession of these lands was the payment to said bands of the sum of $800,000, in annual installments of $80,000 each, without interest. This agreement, or proposed treaty, was submitted to Congress by the Secretary of the Interior with a recommendation that it be confirmed, and by act of February 14, 1873, 17 Stat. 456, Congress confirmed merely the portion of it providing for the cession of said lands and consideration of $800,000 and the method of its payment, specifically excepting paragraphs 3 to 9, inclusive, and appropriated for the payment of the first $80,000 installment thereof, after the ratification by said Indians of the agreement as so amended and confirmed.

The agreement as thus amended and confirmed by Congress was ratified by plaintiff bands on May 2, 1873 (Kappler's Ind. Laws and Treaties, Vol. II, p. 1070), and Congress thereafter annually appropriated for the remainder of the annual installments due said bands under said agreement, it being specified in the appropriation acts that the sum appropriated was the current installment of the amount provided by said agreement "for the relinquishment by said Indians of their claim to or interest in the lands described in the second article of the treaty made with them February eighteen, eighteen hundred and sixty-seven." 18 Stat. 167, 441; 19 Stat. 192, 287; 20 Stat. 81, 230; 21 Stat. 127, 467; 22 Stat. 81.

In the making of said agreement of September 20, 1872, it was the understanding and belief of the parties thereto that the approximate area of the tract of land to be sold and ceded by the Indians under said agreement was 8,000,

000 acres; whereas the actual area of said tract was 11,000,000 acres, or approximately 3,000,000 acres more than was believed to constitute its area. The value of said lands, either at the time of the making of said agreement, or on March 3, 1863, is not satisfactorily shown by the evidence.

In plaintiff's original petition, filed March 17, 1917, the actual area of said tract of land was alleged to be 9,387,064.12 acres, an excess of 1,387,064.12 acres over and above the 8,000,000 acres supposed to have been its area; and the claim for this alleged excess, at $1.25 per acre, was $1,733,830 [Vol. 56] 580.15. In plaintiff's amended petition, filed March 26, 1920, the actual area of said tract is alleged to be 11,000,000 acres, and the excess area 3,000,000 acres, for which claim is now made, amounting at $1.25 per acre, to $3,750,000.

XII

In the northeastern part of the present State of North Dakota, between Goose River and Devils Lake on the south and the Dominion of Canada on the north and between the Red River of the North on the east and Turtle Mountains on the west, is a large tract of land now constituting several counties and parts of counties of said State, for which claim is made by plaintiffs in the sixth count of their petition.

In the early part of the nineteenth century there were conflicting claims to the Chippewa Indians on the north and the Sioux Indians on the south, in the territory now constituting Minnesota and North Dakota, as to the limits or extent of their respective lines or territory, as a result of which an agreement was entered into about the year 1825 between the said Chippewa Indians and the plaintiff band of Sioux Indians, in which it was agreed that the boundary line between their lands west of the Red River of the North, in what is now the State of North Dakota, should begin at the mouth of Goose River, where it enters the Red River of the North, and extend up Goose River to its source, thence due westward through the center of Devils Lake, thence leaving said lake and continuing westward to Mauvais de Terre, and from there in a northwesterly direction to a point on the Missouri River within gunshot sound of Little Knife River. This boundary line was practically identi-

eal with the north boundary line of the lands claimed by plaintiff bands as described in Article II of the said treaty of February 19, 1867, 15 Stat. 505, and sold and ceded by them to the United States by said treaty of September 20, 1872, as set forth in Finding XI, as far westward as this latter line extended.

It appears also that approximately the eastern half of the tract of land north of Goose River and Devil's Lake claimed by plaintiff bands was within the cession by the Chippewa Indians to the United States by treaty of October 2, 1863, 13 Stat. 693.

It does not appear that the plaintiff bands of Indians had any right, title or claim to the said tract of land north of Goose River and Devil's Lake, and does not satisfy the appeal where the exact area of said tract or what was included within the same by the Government survey March 3, 1869.

XIII

By Article I of an agreement entered into between the plaintiff bands and the United States on December 12, 1889, and ratified and confirmed by Congress on March 3, 1891, 26 Stat. 1026, said bands ceded, sold, relinquished, and conveyed to the United States all their claims, rights, title and interest in and to all the unallotted lands in the said Lake Traverse Reservation remaining after the allotments and additional allotments provided for in Article IV of the agreement had been made.

(fol. 57) By Article II of said agreement the United States, in consideration of the aforesaid cession, agreed to pay plaintiff bands at the rate of $1.50 per acre for the lands ceded, and it was further provided that the money so paid for said lands should be held in the United States Treasury for the sole use and benefit of the said Indians, and should, with interest thereon at 5 per cent per annum, be subject at all times to appropriation by Congress for the education and civilization of said Indians as provided in section 5 of the act of February 8, 1887, 24 Stat. 388.

As it was not known just what would be the amount of land left after the said allotments and additional allotments had been made, the appropriation by Congress in section 27 of said act of March 3, 1891, for the purpose of carrying

out the terms of said agreement was based merely upon an estimate by the Interior Department of the amount of land that would be left over after the allotments were made, which estimate was 679,920 acres; and upon this basis the sum of money for deposit in the United States Treasury for the benefit of plaintiff bands was $1,099,800. It was therefore provided by said act that "the sum of $1,099,800, or so much thereof as may be necessary" to pay for said lands, should be placed in the Treasury to the credit of said Indians. Pursuant to this appropriation and the provisions of said act and of said agreement with plaintiff bands, said bands were, on March 3, 1891, credited with the said sum of $1,099,800, and were thereafter credited annually with the interest on this sum. It later developed that a greater amount of land than had been estimated was required to make the additional allotments prescribed by Article IV of said agreement, and that the unallotted lands ceded by the Indians under the agreement amounted to only 608,865.56 acres, instead of the 679,920 acres estimated by the Interior Department, a difference of 71,054.44 acres, the value of which at the agreement price of $2.50 per acre, was $177,635.85. And in the meantime interest on this excess amount credited to said bands had accumulated and been paid or credited to them to an aggregate amount of $58,412.98. In order to correct the account between said bands and the United States under said agreement, the amount of the over credit of $177,635.85 in their favor was, on June 30, 1898, deducted by the Government from the original fund of $1,099,800 deposited to their credit, and the said $58,412.98 excess interest paid them was thereafter deducted in six annual installments from their income in the hands of the Government.

In the making up of the rolls of the Indians entitled to participate in the allotment of the lands of the said Lake Traverse Reservation there was added to the rolls, and later given allotments, a large number of Indians who were claimed by plaintiff bands not to be entitled to such enrollment and allotments, and against which protest was made by said bands. It does not satisfactorily appear what was the number of those whose enrollment was thus protested against, nor does it appear how many, if any, were not entitled to enrollment.

XIV

On July 3, 1877, one John B. Sanborn entered into 217 separate contracts with members of plaintiff bands to prosecute their claims against the United States growing [illegible] out of the confederation of their annuities by the said act of February 16, 1863, for a consideration of 15 per cent of the amounts recovered on said claims, said contracts to run for a term of 12 years. In some instances the Indian parties to these contracts also signed for their wives and children. These contracts were submitted to the Secretary of the Interior on September 28, 1882, but with a reduction of the rate of compensation to 10 per cent of the amounts recovered, which modification was accepted by said Sanborn on October 23, 1882.

By Article III of the said agreement of December 12, 1888, 26 Stat. 1035, the United States agreed to pay to the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, parties thereto, per capita, the sum of $[illegible] being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people which sum was paid by the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July 23, 1851, and of which they have been wrongfully and unjustly deprived by the operation of the provisions of the said act of February 16, 1863, said sum of $[illegible] being at the rate of $15.00 per annum from July 1, 1862, to June 1, 1888, less said Indians' per capita share of the sum of $616,086.52 theretofore appropriated by Congress for the benefit of said bands. It was further provided in said Article III of said agreement that the United States should pay said bands, per capita, the said sum of $15.00 per annum from July 1, 1888, to July 1, 1901, the date at which their annuities under the said treaty of July 23, 1851, are to cease. Under these provisions of said agreement of December 12, 1888, a total sum of $[illegible] was paid to said bands, per capita, to plaintiff bands.

Said Sanborn, following the passage of said act of March 3, 1891, ratifying said agreement of December 12, 1888, presented to the Secretary of the Interior a claim for fees under his said contracts, which claim was referred by the

Secretary of the Interior to this court on November 28, 1891, for findings of fact and conclusions of law under the provisions of section 12 of the act of March 3, 1887, commonly known as the Tucker Act. This court found, upon the evidence and facts in the case, that said Sanborn had prosecuted the claims of said Indians with reasonable diligence and ordinary skill. It also found, as a conclusion of law, that Sanborn's said contracts with the Indians took effect from their dates, and were thereby not embraced in March 3, 1891, the date of the said act entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1892, and for other purposes," approved March 3, 1891, and as said act of March 3, 1891, prohibited the payment of any fees to the Secretary of the Interior or agents or attorneys for said Indians upon contracts not still in force at the time of the passage of the act. Sanborn's said claim was not paid.

By section 2 of the Indian appropriation act of March 1, 1889, 25 Stat. 980, 994, it was therein provided that the provisions of the act of March 3, 1891, against the payment of fees under approved contracts should not apply to contracts for services to the Indians under the clauses of the Indian appropriation acts of June 21, 1878, and March 3, 1879, and that such contracts should be held to date from their approval by the Secretary of the Interior and the Commissioner of Indian Affairs. And it was further provided that, within a limit of sixty days, the Secretary of the Interior should cause all claims that were then under investigation by the provisions of the act to be audited and paid from the funds of the Indians to whom said Indians belonged. In accordance with the provisions of this act and the terms of his said contract, the said Sanborn, on March 26, 1890, presented to the Secretary of the Interior, from the funds of the Sioux Indians, the sum of $21,206.24 for his services under said contract.

XV

In pursuance of the [illegible] of the Indian Department, [illegible] of Article IV of the said treaty of February 19, 1867, [illegible] for certain portions of [illegible] Indians and for the [illegible] Yanktonais Sioux, [illegible] reason of which the [illegible] and established [illegible]

and unallotted lands of the Devils Lake Reservation and placed to the credit of the Indians of said reservation, up to June 30, 1917, the sum of $121,867.21.

Conclusions of Law

[illegible] the foregoing findings of fact the court decides, as a conclusion of law, that the [illegible] are not entitled to recover said sum [illegible] prosecution thereof. Judgment is rendered against the plaintiffs in favor of the United States for the costs [illegible] record in this cause, the amount to be [illegible] the clerk and collected by him according to law.

Opinion

Booth, Justice, delivered the opinion of the court.

The Congress and the case [illegible] the court for [illegible] jurisdiction to hear and determine it [illegible] the following special act:

[illegible] That any claims of whatever nature which the Sioux Tribe and Wahpeton Band of Sioux Indians may have against the United States [illegible] the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, [illegible] the Sioux and Wahpeton bands from the [illegible] Congress, and [illegible] jurisdiction conferred upon the Court of Claims to hear and determine all claims of said bands against the United States and also all claims equitable [illegible] the United States may have against said Sioux and Wahpeton bands of Sioux Indians, to [illegible] judgment, and in determining the amount to be paid [illegible] the court shall deduct from [illegible] Sioux and Wahpeton bands of Sioux Indians and all gratuities paid [illegible] or appropriated [illegible] Third, [illegible] Fourth and sixth [illegible] provided that in determining the amount to be [illegible] the value of the land [illegible] shall not exceed the value of such land on March third, eighteen hundred and sixty-three. If any such question is submitted to said court it shall settle the rights, both

legal and equitable, of said bands of Indians and the United States, notwithstanding lapse of time or statute of limitations. Such action in the Court of Claims shall be presented by a single petition, to be filed within one year after the passage of this Act, making the United States a party defendant which shall set forth all the facts on which the said bands of Indians base their claims for recovery; and the said petition may be verified by the agent or authorized attorney or attorneys of said bands, to be selected by said bands and employed under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, in accordance with the provisions of existing law, upon information or belief as to the existence of such facts, and no other statements or verifications shall be necessary. Official letters, papers, reports, and public records, or certified copies thereof, may be used as evidence." (Act of April 11, 1916, 39 Stat. 47.)

The Sisseton and Wahpeton Indians are Sioux, bands of the original tribe of Sioux Indians. They, in company with the Medawakanton and Wahpakoota Bands of the Sioux Tribe, found sometime prior to July 23, 1851, in the present State of Minnesota, a habitat along the upper Mississippi River, most of them on the west side of the stream, some few of the latter bands on the east. They were known and spoken of as the eastern, or Minnesota, Sioux, the Government designating them as Sioux of the Mississippi, to distinguish them from the other bands of the same tribe. The four bands ranged over a vast extent of territory and claimed ownership of a vast acreage by reason of that fact. As early as 1851 the Government attempted to reduce the claimed acreage to a reservation basis, and did, on July 23, 1851, 10 Stat. 949, negotiate a treaty with the Sisseton and Wahpetons, by the terms of which certain concessions were made to the Government, and on August 5, 1851, 10 Stat. 954, a treaty was negotiated with the Medawakanton and Wahpekootas, which in conjunction with the treaty of July 23, 1851, provided for the four bands two reservations along the Minnesota River. The Indians were removed to the reservations, each band being assigned the lands granted by the treaty, after which the Sisseton and Wahpeton were known as the upper bands, and

the Mdewakanton and Wahpaku tze as the lower bands, the Government treating and dealing with them under the general appellation of Sioux Nation.

Afterwards, when both of said treaties came before the Senate for ratification, the Senate instead of ratifying them as negotiated, substituted a provision for the purchase of all of said reservations from the four bands for 50 cents an acre, adding this amount to their trust fund, and authorizing the President, with the assent of the Indians, to set apart another reservation outside the limits of the territory ceded to the Government by the treaties for their future home and occupancy. The President was vested with the additional authority to carry the conditions with the consent of the Indians if deemed expedient. The Indians accepted the amendments and the treaties, as amended, were ratified by [illegible] (12 Stat. 1037, 1038, 1039). The 50 cents per acre was paid by the Government and the money was placed to the trust funds of the bands, but the reservation provided for was never set apart for Indians. Instead, settlements be made on the said reservations by white persons. They were not disturbed and many valuable improvements on those reservations. On July 15, 1862, Congress enacted a law authorizing the President to survey and locate homesteads to said bands. There was no record of any official action by the President, but the Indians were in peaceable possession and, as before stated, the lands were not as any was disturbed.

On June 19, 1863, [illegible] Stat. 1037-1039, treaties were concluded with the four bands ignoring the foregoing reservations, by the terms of which the Indians ceded to the Government the portion of the reservations lying on the north side of the Minnesota River. There was additional to them the lands on the south side, which were to be allotted to the Indians in severalty, the surplus after allotments to be held as other Indian lands. The question of title and the price to be paid for the lands on the north side were left to the United States Senate for decision. The Senate, on June 27, 1866, by resolution confirmed the Indians' title to the whole of the reservations and fixed 30 cents per acre as the sum to be paid for the lands ceded to the Government.

The Sisseton and Wahpeton ... received under this treaty $170,880 for 369,600 acres, the same being paid in accord with the act of March 2, 1861, 12 Stat. 237. The allotments, however, were never made, because in August, 1862, the Indian beneficiaries under the treaties joined in an intense, prolonged, and exceedingly savage warfare against the Government, a hostility which required a considerable portion of the Army to finally subdue. A large number of whites—men, women, and children—were cruelly murdered and a great amount of property burned and destroyed. At the time of the outbreak the total population of the Sisseton and Wahpeton Bands, including men, women, and children, was 4,926, and the Medawakanton and Wahpakoota Bands comprised 2,225. By the spring of 1863 the military authorities had succeeded, either by capture or surrender, in taking into custody the greater portion of the Medawakanton and Wahpakootas and a few of the Sisseton and Wahpetons, and crammed them all as prisoners of war at Fort Snelling. On February 16, 1863, 12 Stat. 652, as a further outburst of punishment, by legislative action of that date Congress abrogated and annulled all existing treaties with the Indians and forfeited to the Government all their annuities, charging the same with the payment of all damages occasioned by the outbreak.

On March 3, 1863, 12 Stat. 819, Congress passed an act providing for the creation of a reservation outside the limits of any State for such portions as might be allot to each member of the four bands of Sioux, provided they were willing to adopt the pursuit of agriculture. The act contained a further provision for the sale of the former reservations on the Minnesota River and the investment of the money by the Secretary of the Interior for the benefit of the Indians who actually located on the lands of the new reservation. The President, in pursuance of the foregoing enactment, established temporarily a reservation on the Missouri River in Dakota Territory, and in the following summer drove all the adherents of war except half breeds and women and sent at Fort Snelling, 1,300 in number. There were at least 250 Sisseton and Wahpeton included in this number, and at least 4 of their chiefs and several headmen and subordinate soldiers. On July 1, 1863, a formal Execu-

tive order was issued, setting apart said lands as a reservation for the "Sioux of the Mississippi."

The plaintiff Indians on the facts above epitomized assert a demand for damages rested upon the contention that the President of the United States did not under the act of March 3, 1863, comply with its terms and set apart a reservation for the Sisseton and Wahpeton Indians; that they were not included in the Crow Creek Reservation set apart July 1, 1863; that on July 1, 1863, there were 4,624 of said Indians lawfully entitled to 80 acres each, or 369,920 acres of land, worth $1.25 per acre. In the face of the record it is difficult to comprehend an insistence that the President was remiss in not setting apart 369,920 acres of land in 1863 for the Sisseton and Wahpetons, when those Indians at the time were fleeing from capture, openly hostile to the Government, and being closely and continuously pursued by the Army of the United States. If the Government was put under the unique obligation by the terms of the act of March 3, 1863, of providing a permanent home for individual Indians fleeing from justice to all points in the West and in Canada, then some measure of weight might be ascribed to the contention. The act of March 3, 1863, was obviously intended to remove from Minnesota those bands of undesirable Indians, and it in express terms allotted to only those individual Indians willing to adopt the pursuit of agriculture, hoping thereby to civilize them. It is inconceivable that Congress intended to do more than provide for Indians in amity with the Government and willing to observe the laws. The major portion of the Sisseton and Wahpeton Bands were scattered, some in Canada, many in the far West, and all removing themselves as far and as rapidly as possible from the range of military activities.

Accentuating this position is the further important circumstance that of the hostile Sisseton and Wahpetons, for whom such a large claim is made, none appear ever to have applied for enrollment or allotment at the Crow Creek Reservation, and those in amity who did were cared for. Even (for 64) the small number of peaceable ones removed were loath to and did not long remain there after the subsequent return of the fugitives. The activities of the Army did not cease until late in 1864, and by this time there were few, if any, Sisseton and Wahpeton Indians in Minnesota, and no

such number as now claimed for ever did return. Along about the year 1866 they came drifting back. The Army had been withdrawn from the field and some six or eight hundred were in the vicinity of Fort Wadsworth, in eastern Dakota. The Government attempted on two occasions to treat with them at this place, but was unsuccessful until 1867. In February of that year a treaty was made and two reservations set apart for the members of the plaintiff bands who had not been sent to the Crow Creek Reservation. Finding X details the facts and discloses a final recognition of the Indians' claimed rights more magnanimous in terms than the act of 1867.

The President under the act of 1867 could not accomplish the impossible, and Congress, by subsequent legislation, did even more as a substitute than was imposed upon him by the prior statute. The President was by law charged with providing for an existing and contemporaneous condition of affairs. How manifestly absurd it would have been for him to set aside this vast and extensive acreage for a band of hostile Indians, when by no possible process of reasoning could he apprehend to what extent it would be taken up by the Indians, who had, at least for the time, ostracized themselves. The act of 1867 was no more than a conditional grant, and even if it were otherwise the control and management of Indian tribal lands is exclusively a matter within the jurisdiction of Congress, free from the supervision of the courts. (Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553.)

The next item for which claim is made is rested more upon a supposed moral than a legal obligation. Mutual mistake of fact is asserted as of sufficient force and character to warrant the court in reforming and substantially rewriting the terms of a treaty and an act of Congress; the whole tone of the contention is the more to affect a supplication than an assertion. On June 5, 1872, 17 Stat. 281, Congress passed an act directing the Secretary of the Interior to investigate and report what title and interest the plaintiff Indians had in a large area of lands, outside their reservations at Lake Traverse and Devils Lake, and whether any compensation ought in equity and good conscience to be paid the Indians for whatever title they might have. Under the authority of the act the Sec-

retary appointed a commission, which finally reported that in its judgment the treaty of February 18, 1867, between the Government and the Indians, recognized the title of the Indians thereto, and that the Government under the facts was estopped to deny it, a very doubtful conclusion in view of the situation at the time, for the title asserted by the plaintiff Indians was assiduously disputed by the Missouri Sioux and the Government, by the treaty of 1867, confirmed to the plaintiff Indians only so much of the lands as were embraced within the two reservations set apart for them. It is true the Government did acquire rights of way (sec. 6) for telegraph lines and public roads, and in this respect did recognize some proprietary interests in the lands, but it may well be that the motive which prompted such generous conduct was more in the interest of composing hostility to be feared from the Indians without so acting.

In any event, the point is not of great importance, for negotiations progressed to the point of bargain and sale and finally on May 2, 1877, a treaty was fully ratified and confirmed, with the positive assent of the Indians, by the terms of which these lands outside of said reservations, specifically described by metes and bounds, were ceded to the United States for $8,850,000, and the moneys subsequently paid as per the terms of the said. Now, more than a half century after the event, a claim is set up that the treaty was procured by misrepresentation and both parties were in error as to the acreage of the cession, the Indians believing that they were parting with 8,000,000 acres at 10 cents an acre and the United States believing that to be the extent of the lands. The facts negative the claim, notwithstanding the cession was of 11,000,000 acres, and we may not under the late receipt parol testimony to nullify the terms of a treaty, negotiated and ratified in conformity with law. As was said in the case of United States v. Old Settlers, 148 U. S. 468:

"There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846 (or any other), and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is

essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its action or the action of the Government to judicial decisions, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference."

In 1917 we had before us a contention similar to the one advanced in this case, and the court in disposing of it (Otoe and Missouria Indians v. United States, 52 C. Cls. 424, 429) used this language: "That this [act] does not give this court jurisdiction to inquire into the inequity or impropriety of any of these treaties between these Indians and the United States is so obvious as to hardly need citation of authorities."

The jurisdictional act here involved is not different in any essential respect from those construed in the citations mentioned and is not so worded as to make it an exception to the well established rule. The item is not allowed.

The plaintiff Indians manifestly misapprehended the scope and character of the jurisdictional act and the limitations of the court thereunder. There is nothing in the act which authorizes us to go into a minute investigation of the Indians' tribal relations to the Government and delve into the endless negotiations leading up to the consummation of treaties. We can not ascribe fraud and misrepresentation as the motive for legislation or treaties. Our jurisdiction is limited to rights which may or may not accrue under treaties and acts of Congress. When Indian rights of [fol. 66] property are fixed by the terms of treaties and statutes we are bound to accept them as so fixed. The Supreme Court has so held innumerable times, the citations appearing in 52 C. Cls. 429.

In view of the foregoing statement there is no necessity for any prolonged discussion of the claims made under items 3 and 4 of the petition.

The Government under the various treaties mentioned purchased the lands described. In 1852 the Indians assented to the arrangement, accepted the benefits stipulated, and have recently recovered in this court the balance of their restored annuities. The development of the situation finally culminating in the establishment and sale of the res-

ervation set apart on the north and south sides of the Minnesota River in 1851 [1852] has been fully adverted to. The Indians concede that in so far as the express terms of the treaties are concerned, they were fully complied with and assuredly we may not go back to contemporaneous times on the faith and credit of rapid testimony given at this late date to challenge the Indian signatures appearing on the treaties, and ascribe a wholesale overreaching of the Indians by the Government's representatives, including the Senate of the United States.

In the case of Delaware Indians v. Cherokee Nation, 193 U. S. 127, 141, the court said: "We can perceive no room in this case for a departure from the familiar rules of law probating written instruments from the uncertainties of parol testimony. The testimony offered was in the shape that of interested persons nearly 50 years after the agreement had been reduced to writing and signed by the parties thereto."

Judgment for $[illegible] is passed in item 5 on the theory of an overpayment to the Mdewakanton and Wahpakoota Bands out of the funds realized from a sale of the reservations of the four bands originally set apart alongside the Minnesota River by the eight treaties mentioned in Finding IX.

It is to be recalled that the four bands on the date hostilities were instituted by the Indians against the white settlers in 1862 were residing on their respective reservations on the south side of the Minnesota River, adjoining each other. The hostilities alleged landed interests of the bands in Minnesota had by successive treaties been circumscribed to these limits. In February, 1863, as heretofore appears, Congress passed an act annulling all treaties and forfeiting all the annuities of the offending Indians. The effect of the legislation was to forfeit all claims of the Indians thereinbefore existing and created by former treaties and acts of Congress. Lane Wilson v. Hitchcock, 187 U. S. 355. On March 3, 1863, 12 Stat. 819, at a time when a large majority of the plaintiff Indians were still hostile, and evidently prompted by a desire to and intent to provide for the permanent removal of the Sioux bands of Indians to a distant point away from the scenes and surroundings of the then existing warfare, as well as to attempt the civilization of

the bands, Congress provided for the sale of their reservations on the Minnesota River, forfeited under the preceding act, and the investment of the proceeds by the Secretary of the Interior for the benefit of the Indians in setting them [illegible] up in agricultural pursuits on their new reservation to be provided under the act.

The sale of the reservations began in 1865 and continued for many years, the amount finally realized reaching the total sum of $3,039,867.71. The record leaves no room for doubt that $206,753.61 of this total sum was expended by the Secretary for the joint benefit of the two bands, and it is beyond the range of possibility to apportion accurately the amounts expended for each band. In July, 1870, 16 Stat. 361, Congress directed explicitly the manner in which the balance of the funds should be distributed, and the record conclusively establishes the observance by the Secretary of this act. The plaintiff Indians, if we correctly appraise their contention, insist that the proportionate distribution established by the act of 1870 should antedate the passage of the act itself, and apply with equal force to the distribution of the entire sum, thus creating the deficit of which they now complain. Laying aside the defense interposed that the entire sum was a mere gratuity given the Indians subsequent to the act of forfeiture and incapable of becoming the subject matter of a cause of action, we believe the claim without merit. There were no express terms in the act of 1863 which divested the Secretary of an exercise of discretion in expending the funds for the benefit of such Indians of the bands as were willing to adopt the pursuit of agriculture, and no hard and fast limitations imposed upon him in any other respect.

The act of 1863 set aside a new home for the bands and those who were willing to settle and abide were to become the beneficiaries of the money to be received from the sale of their former home. The funds themselves were depleted in sums because of the Indian war, and apportionment in accord with numbers was impracticable. Later, in 1870, when peace had been established and the returning Indians were capable of enumeration, Congress adopted the method of apportionment, and it was followed. There is nothing in the act of 1870 of a retroactive effect, for the proviso thereto expressly makes it operative prospectively.

In seeking judgment for the value of 3,000,000 acres of land at $1.25 per acre, as alleged in item 6, said not to have been properly included in the treaty of 1872, plaintiff Indians are obviously and concededly put to the necessity of attempting to vary the plain and unambiguous terms of a treaty, duly ratified in 1872, which specifically provided for the cession to the Government of not only the lands specifically described therein but also "all lands in the Territory of Dakota" to which they had title or interest. Plaintiff Indians early asserted ownership over an exceedingly large acreage of territory lying in the northern portions of what subsequently became Minnesota and Dakota Territories. This claim was vigorously disputed by the Chippewa Indians, and frequent clashes ensued. In 1825 the Sioux tribe and the Chippewas entered into an agreement respecting the division of the lands and fixed the boundaries thereof, and the boundary so fixed between them corresponds with substantial exactness to the northern boundary of the lands described in Article II of the treaty (fol. 68) of February 19, 1867, 15 Stat. 505, all of which lands were sold and ceded by plaintiffs to the United States by the treaty of September 20, 1872.

We have said that the plaintiffs in order to support attempt to vary the plain terms of a treaty by parol testimony. While the return, the contention goes much further, and we are asked to annul the treaty of 1872 upon the grounds of fraud and circumvention said to be established by this same class of testimony. The mere statement of the proposition is its own refutation. The plaintiffs in their brief concede that the decisions of the Supreme Court present insurmountable difficulties in the way of recovery, and seek to overcome the same by a bold appeal to precedents in Indian cases that Congress conferred on this court an unique and sui generis jurisdiction, a grant of authority to go behind a consummated agreement as expressed in treaties and acts of Congress and accept the utterly unreliable and variable self-serving statements of witnesses made a half century after the event, supply fraud, misrepresentation, and all sorts of irregularities and dishonest conduct to those who negotiated and procured the same, a plenary authority to hold aborigi treaties inoperative, unilateral, and oppressive. The claim under this item

is especially in keeping with this emphasized and repeated contention. The treaty of 1872 (Kappler's Treaties, Vol. II, p. 1057) unmistakably transfers to the United States all the title the Indians possessed to this tract, the extent of which the Indians were then, and are now, in more or less ignorance, as well as other lands to which they claimed title in the Territory of Dakota; the Government manifestly intending to acquire all outstanding lands claimed by them and conclude all controversy with respect thereto.

It would be a most remarkable situation if at the time the Indians were unaware that this acreage was not included in the treaty. One fact positively negatives the statement. The United States immediately took possession, opened the lands to public settlement, and this they did not do until after the treaty was legally concluded. As a matter of fact, Indian claims to immense territories at the time concerned always presented a matter of great indefiniteness, the Indian asserting title to all the lands over which he hunted, and it was not generally possible, as has not usual, to speak of the estimated claims in terms of acreage. More comprehensive terms were employed, so as to embrace the total claim of the Indian tribe or band. Subsequently when these immense tracts were surveyed and definitely defined many conflicting claims were conceded from the Indians challenging the correctness of boundaries and grants. So it is with this claim. We can not attach credence to the testimony offered in this case. Assuredly we may not go behind the plain terms and conditions of a treaty and set it aside, when it is properly executed by the tribe or band, on the mere assertion of a few members of the tribe that it was not understood or assented to. [See Wolf v. Hitchcock, supra.]

In 1889 the Government entered into an agreement with the plaintiff Indians whereby the Indians disposed of all surplus lands, after individual allotments to them, contained in the Lake Traverse Reservation. This agreement was ratified and confirmed by act of Congress of March 2, 1891, 26 Stat. 1035, section 26, and by its terms the Government did duly agree to pay $2.50 per acre for the lands so ceded, the total sum with 5 per cent interest thereon to be subject to appropriation by Congress for the benefit of the Indians as aid of their civilization, as provided

was not made up of Sisseton and Wahpeton Indians, but that members of the band should have been denied participation because not of the full blood. Congress has the power to provide a method of ascertaining citizenship in Indian tribes. Cherokee Nation v. Hitchcock, 187 U. S. 294; Gritts v. Fisher, 224 U. S. 640. While under the jurisdictional act we have the power to adjudicate upon a proper record as to whether an act of Congress or agreement has been observed in accord with its terms and intent, we may not do so in the present instance for a decided lack of proof with respect thereto.

Item 8, Finding XIV, is a claim for reimbursement for the amount of an attorney's fee paid to John B. Sanborn [fol. 70] by the Secretary of the Interior on March 30, 1899. The gravamen of the complaint is that Sanborn's contracts were with individual Indians and not with the band, and hence was not a legal charge against the latter. The fee was paid from the funds of the plaintiff band, and Sanborn's employment originated in 217 contracts with individual Indians. Of this there can be no doubt. We had before us the same question in the case of Winton v. Mississippi Choctaws, 255 U. S. 373, and the Supreme Court held adversely to the plaintiffs' contention here. While the act of March 1, 1889, 30 Stat. 924, 946, is not as broad as the acts involved in the Winton case, still the principle is the same, and on the authority of that case the item fails.

Items 9 and 10, Findings XV and XVI. These items are so obviously devoid of merit that we think the findings fully explain them. The claim itself is concluded by the case of Lone Wolf v. Hitchcock, supra, a case almost exactly similar.

The petition will be dismissed. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

[fol. 71] VI. Judgment

At a Court of Claims held in the City of Washington on the Twenty-third day of April, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge and decree that the plaintiffs, as aforesaid, are not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed. And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiffs, as aforesaid, the sum of Three hundred and seventy-nine dollars and thirty-one cents ($379.31), the cost of printing the record in this court, to be collected by the clerk, as provided by law.

VII. Proceedings After Entry of Judgment

On December 24, 1923, the plaintiffs filed an application for appeal to the Supreme Court.

On January 14, 1924, the court entered the following order on said application:

Order

It is ordered by the Court that the plaintiffs' application for appeal be and the same is denied.

This application was not filed within the time prescribed by the statute, section 242 of the Judicial Code.

On May 21, 1927, on motion made therefor, Thomas Sterling, Esq., was substituted as attorney of record.

VIII. Application for Appeal—Filed May 21, 1927

Now come the plaintiffs by their attorney, and under the authority of the Act of Congress approved March 4th, 1927, show to the court that this case involves more than $3,000.00; that on the 23rd day of April, 1923, a judgment was rendered by this court dismissing plaintiffs' amended petition, and plaintiffs hereby make application for and give notice of an appeal to the Supreme Court of the United States.

Thomas Sterling, Attorney of Record.

Dated this 20th day of May, 1927.

IX. Order Allowing Appeal.

Order

It is ordered by the Court this 6th day of June, 1927, that the plaintiffs' application for appeal be and the same is allowed.

Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,048. Court of Claims. Term No. 596. The Sisseton & Wahpeton Bands of Sioux Indians, appellants, vs. The United States. Filed October 28th, 1927. File No. 33,048.

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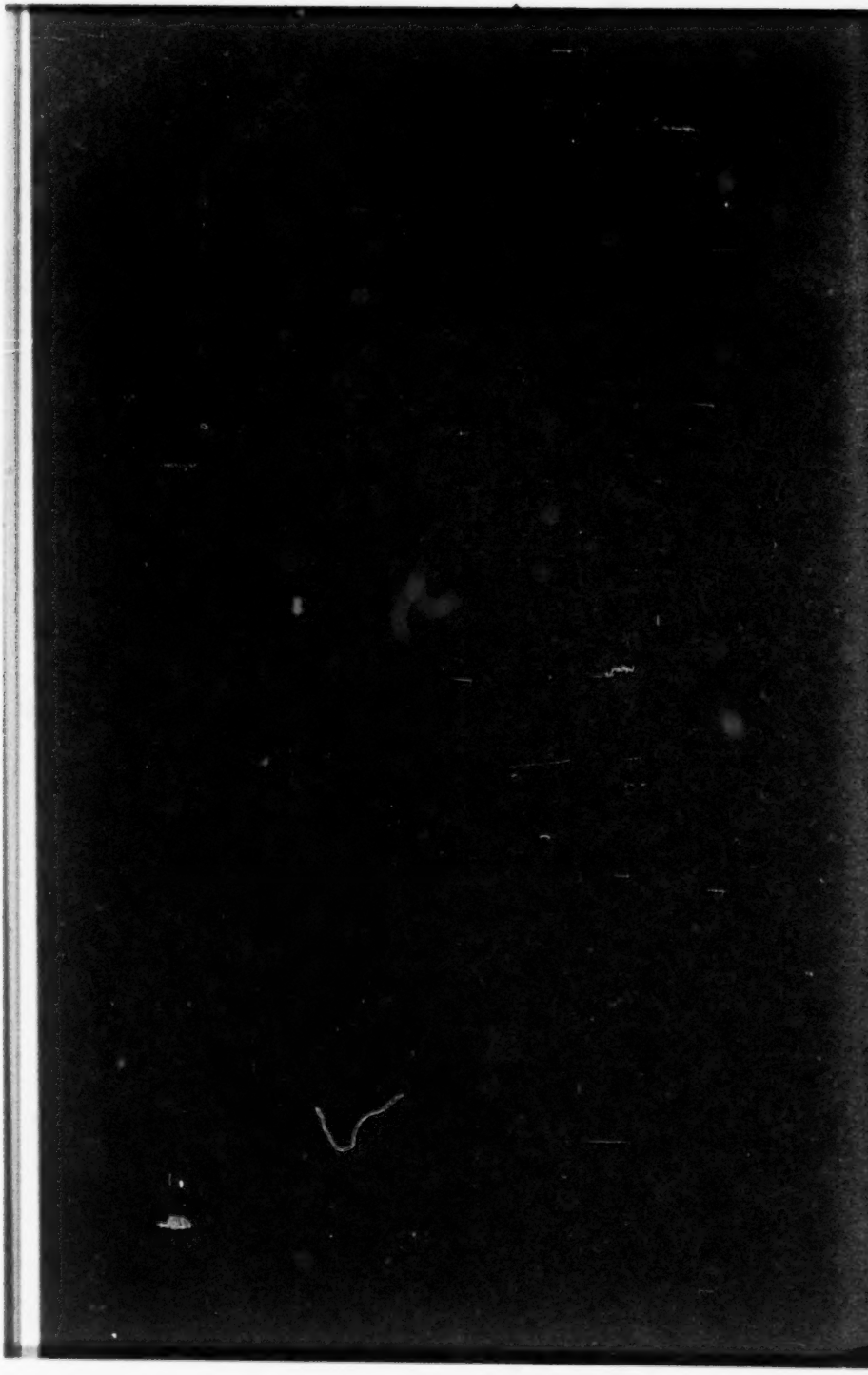

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 596

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS ON MOTION TO DISMISS.

The Solicitor General bases his motion to dismiss the appeal from the judgment of the Court of Claims on the sole ground that the only method provided by law for reviewing the judgment of the lower court is by writ of certiorari.

ARGUMENT.

The position of the Solicitor General amounts to this: That since a petition for certiorari to the Court of Claims had been filed in and then denied by this Court, the plaintiffs are without remedy, regardless of the fact that there has been no hearing nor decision of the case upon its merits, and regardless also of the fact that the Act of Congress of March 4, 1927, expressly gives the plaintiffs one year from and after the date of the approval of the act in which to *appeal* "from any or all orders, judgments, or decrees rendered against them in the trial of said action heretofore had."

In the first place, the quotation from the brief in support of the petition for certiorari (page 3, respondent's brief) does not indicate a belief on the part of appellants that, under the statutes and rules governing, certiorari is the only method of obtaining a review in the Supreme Court. Further, we doubt the construction given Section 3 of the Act of February 13, 1925, by respondent, even as to provisions for appeals contained in jurisdictional acts passed *prior* to said Act of February, 1925. Said Section 3 certainly does not in terms abolish the right of appeal, nor does it in terms repeal the provisions of all or of any act which gives the right of appeal from the Court of Claims to the Supreme Court.

Subdivision (*b*) of said Section 3 makes it "competent" in any case in the Court of Claims "for the Supreme Court upon the petition of either party,

whether Government or claimant, to require, by certiorari, that the cause * * * be certified to it for review and determination with the same power and authority and with like effect as if the cause had been brought there by appeal."

Surely, to make it "competent" for the Supreme Court to require by certiorari that the cause be certified to it, does not make certiorari the sole and exclusive method of procedure, nor mandatory upon the parties that they proceed by that method or not at all.

So far as the language of subdivision (*b*) of Section 3 is concerned the remedies by appeal and by certiorari are concurrent and the latter is not exclusive of the former.

And, if under subdivision (*b*) they are concurrent, then subdivision (*c*), making "All judgments and decrees of the Court of Claims subject to review by the Supreme Court as provided in 'this section' and not otherwise, does not by implication repeal prior statutes giving the right of appeal."

It is like the case of a statute giving a new remedy, but which under the authorities does not, without express repeal, take away a remedy previously existing.

Sutherland Stat. Con., 2d Ed., Sec. 260

> "If by fair and reasonable interpretation acts which are seemingly incompatible and contradictory may be enforced and made to operate in harmony and without absurdity both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment."
>
> Ibid., Sec. 267, p. 511.

But the question we are here dealing with is not whether Section 3 of the Act of February 13, 1925, repeals any *prior* act or acts allowing appeals from the Court of Claims, but whether appeal is a proper method of procedure under the later Act of March 4, 1927, expressly giving the right of appeal in *this particular case*.

Counsel for respondent cite six different jurisdictional acts, all relating to Indian claims and passed subsequent to the Act of February 13, 1925, in which the right of appeal from the Court of Claims is expressly given to either party.

From the language of these acts, counsel deduce the proposition that Congress through "force of habit" has continued to use the expression, "with right of appeal to the Supreme Court as in other cases."

If so, it seems to be a thoroughly seasoned habit.

It will be noted, however, that in the last three cases cited by counsel the phrase "as in other cases" is omitted, and the right of appeal is given without reference to "other cases."

Likewise, in the case at bar "other cases" are not mentioned, and the right of appeal is absolute for a period of one year from the date of the approval of the act.

It would seem conclusive from this often reiterated right of appeal that whatever Congress may have intended in regard to other cases cognizable in the Court of Claims, it intended just what it said in this class of special jurisdictional acts, namely, to grant the right of appeal.

Section 145, Judicial Code, prescribes what may be termed the general and continuous jurisdiction of the Court of Claims. For the various subjects therein enumerated, no special or additional legislation conferring jurisdiction on that court is necessary.

In passing the Act of February 13, 1925, Congress could well have had in mind the general law in regard to the jurisdiction of the Court of Claims, and the numerous cases for which that law provided, without at the same time considering what, if any, cases would arise for the adjudication of which special jurisdictional acts would be required. But in passing subsequent jurisdictional acts granting the right of appeal from the Court of Claims the presumption is that Congress knew of the Act of February, 1925, and of the provisions of Section 3 thereof, and with that knowledge acted deliberately when it in terms gave the right of appeal in such subsequent acts.

It will take more than an assertion that Congress acted through mere "force of habit" to overcome that presumption.

Moreover, it would appear from the nature and frequency of these Indian Claim cases, as well as from the ordinary situation and circumstances of the claimants themselves, that Congress intended the usual and general right of appeal should be preserved to them. The Act of March 4, 1927, being remedial in nature, is, under the general rule, to be liberally construed to effect the purpose intended by Congress. Such purpose would be defeated under the construction contended for by respondent.

One further consideration affecting this particular case and of which counsel for respondent makes some mention:

Not only does the Act of February 13, 1925, limit the time for filing petitions for certiorari to three months, but Section 243 of the Judicial Code limits the time of appeal to ninety days from the rendition of the judgment. It is presumed that Congress knew the law limiting the time in both forms of procedure, and then deliberately in derogation of that law made of this a special case giving *an entire year* from the approval of the act in which to appeal. This action of Congress fixing this particular time limit would seem to dispose of the contention that Congress meant otherwise than what it plainly said, and to make the right of appeal by appellants free from all doubt.

Respectfully submitted,

THOMAS STERLING,
Attorney for Appellants.

ROBERT T. TEDROW and
WALTER W. McCASLIN,
Of Counsel.

Office Supreme Court, U.
FILED
MAR 5, 1928
CHARLES ELMORE CROP
CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 596.

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

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Counsel for Appellants.

ROBERT T. TEDROW,
WALTER W. McCASLIN,
Of Counsel.

(33,048)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 596.

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS, APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

Opinion of the Court Below.

The opinion of the Court of Claims is reported in Vol. 58, Court of Claims Reports, page 302.

Jurisdiction.

The case is now pending in this Court on appeal from the judgment of the Court of Claims rendered April 23, 1923 (R., 63, 64). The specific claims here advanced on behalf of appellants arise out of the findings of fact of the Court of Claims numbered respectively, V, VII, VIII and XI (R., 34-35, 36-38, 39, 41-43) and the conclusions of law therefrom (R., 50).

The case was numbered 33,731 in the Court of Claims, appellants having on December 24, 1923, filed an application for appeal to this Court, the Court of Claims on January 14, 1924, denied said application for the reason that the same was not filed within the time prescribed by Section 243 of the Judicial Code (R., 64). This appeal is taken under authority of the Act of Congress approved March 4, 1927, as follows:

Be it enacted, etc., "That the plaintiffs or complainants in suit numbered 33,371 in the Court of Claims of the United States be, and they are hereby granted one year within which to appeal from any or all orders, judgments or decrees rendered against them in the trial of said action heretofore had; Provided that the time within which said appeal may be taken shall begin to run with the date of the approval of this Act." Vol. 44, Part 3, p. 1847, Private and Concurrent Resolutions, etc. On June 6, 1927, on application of present counsel the Court of Claims made its order allowing such appeal (R., 65).

Statement of the Case.

The suit was brought in the Court of Claims to recover on ten several items or claims against the United States arising out of or involving various treaties or agreements between the United States and appellants and acts of Congress in relation thereto (R., 4-30).

The Court of Claims made its findings of fact as to all the claims and as conclusion of law found that appellants were not entitled to recover on any of such claims and rendered judgment accordingly (R., 30-50).

The specific claims here asserted arise out of the treaty of June 19, 1858, between the appellants and the United States, 12 Stat., 1031, 1037, under which appellants claim they are justly entitled to recover the sum of $541,120, being the difference between the price or value of 569,600 acres of their Minnesota River Reservation lands at $1.25 per acre and 30 cents per acre or $170,880, the price received (Finding V; R., 34-35).

(2) The claim that under the Act of March 3, 1863, 12 Stat., 819, appellants received none of the benefits assured them by the terms of said act and that they are entitled to recover the value of 322,080 acres of land instead of 361,920 acres, as claimed in the amended petition, at $1.25 per acre, or the sum of $402,600 (R., 4-8). Findings of fact 7, 9 (R., 36-38, 39).

(3) The claim that under the Treaty of September 20, 1872, Kapler's Ind. Laws and Treaties Vol. II,

1057, appellants should recover the sum of $300,000 or at the rate of ten cents per acre for 3,000,000 acres of land ceded under the erroneous estimate and belief on the part of the United States and appellants that 8,000,000 acres only were ceded whereas the actual acreage ceded was 11,000,000. That appellants were paid $800,000 or at the rate of ten cents per acre for 8,000,000 acres but have not been paid for the 3,000,000 acres in excess of said estimate (R., 8 11). Finding XI (R., 41 3).

(4) The claim that under the Treaty of July 23, 1851, 1 Stat., 949, a trust fund of $1,360,000 was created for the benefit of appellants out of the proceeds of the cession by appellants of all their lands in the then Territory of Minnesota and State of Iowa to the United States; that interest only at the rate of 5% per annum was paid on said fund for a period of fifty years and that no part of the principal of said sum has ever been paid, and that under the terms of said treaty and the conditions under which made appellants are justly entitled to recover the principal of said trust fund, amounting to $1,360,000 (R., 16 18). Finding VIII (R., 38).

Specification of Errors

The errors intended to be urged are as follows:

(1) The Court of Claims having made, among others, its findings of fact No. V, involving said treaty of June 19, 1858, erred in not holding there was a mistake on the part of the appellants and a mutual mistake be-

tween the parties to said treaty as to the value of the lands ceeded thereby, and erred in holding that appellants were not entitled to recover the difference between the value of said lands at 30 cents per acre and $1.25 per acre.

(2) The court having, among others, made its findings of fact No. VII, involving the provisions of the act of March 3, 1863, erred in not holding that appellants had not received the benefits assured them by said act, and erred in holding that they were not entitled to recover the value of the lands assured them at the rate of $1.25 per acre.

(3) The court having, among others, made its findings of fact No. XI, involving the treaty of September 20, 1872, erred in not definitely holding that there was a mutual mistake of fact as to the quantity of land ceded by said treaty and erred in holding that there was no satisfactory evidence of the value of the land ceded in excess of the estimate of 8,000,000 acres and in denying the right of appellants to recover for such excess at the rate of ten cents per acre.

(4) The court having, among others, made its finding VIII, involving the treaty of July 23, 1851, erred in not holding that appellants were at the time of such treaty mistaken as to their rights under existing law (Rev. Stat., Sec. 2079), and in denying the right of the appellants to recover the principal of the trust fund created by the terms of said treaty.

(5) The court erred in denying to appellants any relief whatever under their said several claims and in dismissing the petition of appellants and rendering judgment against them.

ARGUMENT.

There were in this case ten different items or causes of action, for each of which recovery was sought in the amended petition and in the hearing before the Court of Claims.

Complaint is here made that the court erred in denying the right of the plaintiffs to recover in the four particulars mentioned in their specification of errors herein. The Jurisdictional Act of April 11, 1916, 39 Stat., 47, giving the right to these petitioners, plaintiffs, to sue in the Court of Claims is a remedial act, its object being to give opportunity for the redress of certain alleged grievances. It is presumed that in the enactment of the statute Congress did not intend it as a mere gesture towards giving relief either legal or equitable. The act should therefore be liberally construed to effect the real purpose intended.

> Sutherland on Statutory Construction, Sec. 670;
> Beley vs. Napthaly, 169 U. S., 353;
> United States vs. Old Settlers, 148 U. S., 427.

Judgment having gone against the plaintiffs and their time for appeal having expired, Congress passed the act approved March 4, 1927, giving the plaintiffs "one year within which to appeal from any or all orders, judgments or decrees rendered against them

in the trial of said action heretofore had;" the time within which the appeal may be taken to begin to run with the date of the approval of the act.

This action after such lapse of time would indicate a belief on the part of Congress that the plaintiffs have rights legal or equitable or both which through oversight or error on the part of the trial court were not properly adjudicated and that the plaintiffs should now have the benefit of a review of the record by this honorable Court.

I.

The Claim for Additional Compensation for Lands Ceded Under the Treaty of 1858.

Similar treaties were made June 19, 1858, 12 Stat. 1031, 1037, between the plaintiff bands and the United States and the Medawakanton and Wahpakoota bands and the United States relative to the lands of their Minnesota River reservations.

In pursuance of these treaties the Senate of the United States, by its resolution of June 27, 1860, 12 Stat. 1042, declared that said bands had a just and valid right and title to the whole of said reservations, respectively, and that they should be allowed 30 cents per acre for the portions thereof lying on the north side of the river. That portion of the reservation of these plaintiffs lying north of the river consisted of 569,600 acres. For this they were paid at the rate of 30 cents per acre, or a total of $170,880 (finding numbered V, Record, p. 41).

The court further finds that the value of this land on March 3, 1863, was $1.25 per acre (Record, p. 41).

Such then must have been its value or approximate value at the date of the Senate Resolution, June 27, 1860. Such we contend is the valuation authorized by the Jurisdictional Act under which this action was brought under the proviso: "That in determining the amount to be entered herein the value of the land involved shall not exceed the value of such land on March third, eighteen hundred and sixty-three." Under the Act of April 24, 1820, the minimum price at which the public lands could be offered for sale is $1.25 an acre. Revised Statutes, Section 2357.

Why should the Jurisdictional Act have fixed March 3, 1863, as the date for determining the value of lands for which compensation is now sought?

We can conceive of two reasons: First, in order to guard against exorbitant claims for compensation based on values obtaining after the lapse of many years of constantly increasing values largely due to the settlement and improvements made by the white man, it was deemed a wise policy to fix an early definite date beyond which claimants could not go in search of a basis for compensation in land values; second, in cases where the treaty of cession was made prior to March 3, 1863, *and just compensation for the lands ceded has been delayed for almost two generations*, there was some semblance of justice in allowing claim-

ants such enhancement in value as might have accrued between the date of the cession and March 3, 1863. In any such case the time could not have been long enough to have permitted any great increase in value.

Along with the findings in regard to the location of these Minnesota River reservation lands is coupled the question of judicial notice. The Court will take cognizance of the Minnesota River of the territory through which it flows, and that it is one of the best agricultural regions of the United States.

As to the scope of judicial notice and its application here, we cite:

Watts v. Lindsey, 2 Wheat. 158.
McNutt v. Tuttle, 19 Wall. 352.
People v. Truckee Lumber Co., 116 Cal. 397; 48 L. R. A. 581.
Rulings of the Land Vol. II, p. 1058 and p. 1063.

It must be apparent therefore from what the Court of Claims has found in regard to the value of these lands and from what the court knows of the generality, history, and natural resources of the country that the value of the lands ceded was greatly in excess of 50 cents per acre at the time of the passage and approval of the Sioux act of 1889.

Are the plaintiffs to be denied all relief on this item because the court of claims did not see fit to apply the March 3, 1863, standard of value, or did not determine the exact value at the time of the treaty of June 19, 1858, or at the time of the passage of the Sioux act of 1889 two years later?

On its face the transaction seems to put the Government in the position of an unconscionable profiteer. It acquires at 30 cents per acre and can and does immediately dispose of at $1.25 per acre.

But assuming now that the Senate acted in good faith in allowing plaintiff lands 30 cents per acre for their Minnesota lands, there must have been at the date of the resolution a mistake on its part of a material fact—the fact of the true value of the lands not settled upon and improved. The best evidence of such mistake is that part of the resolution of June 27, 1860, just quoted. If the Senate of the United States with its superior knowledge and means of knowing was mistaken then *a fortiori* were the Indians with their inferior knowledge of the value of lands for agricultural purposes, with their lack of knowledge of immigration and of the increasing demand for farm lands, also mistaken. It will be borne in mind that this treaty was made in 1858 when these Indians were in a much more backward state and less able to understand their rights than now, after more or less of contact with the evolving influences of nearly three-quarters of a century.

Suppose however the mistake falls somewhat short of what the law recognizes as a mutual mistake, and that it is unilateral rather than mutual; then we have the rule that, "knowledge by one party that the other is under a mistake as to such a matter as would make the transaction voidable if the mistake were mutual, if accompanied by any circumstances deemed inequitable, and perhaps generally without more, will have the

is judicially known, the denial of the right of recovery is quite inconsistent with the doctrine laid down from time to time by this Court in regard to the rights and duties arising out of the relation of the Government to the Indians.

The well recognized relation is that of a superior to an inferior, the latter being placed under the care and protection of the former.

Ex Hoff, 197 U. S., 488, cited in Hollister v. U. S., 76 C. C. A., 340, 145 Fed., 776.

The Indian nations have been denominated domestic dependent nations, their relation to the United States resembling that of a ward to his guardian.

Cherokee Nation v. Georgia, 5 Pet., 1, 8 L. Ed., 25.

Roff v. Burney, 168 U. S., 221, 42 L. Ed., 443.

The relationship being that of superior and inferior or like that of guardian and ward out of which arises the special duty of care and protection, the dealings of the Government with the Indians must be interpreted in the light of such relationship and such duty.

Choctaw Nation v. The United States, 119 U. S., 1.

The court in this case used the following language:

> "While the relation of superior and inferior which exists between the United States and the Indians whereby the latter are placed under the care and control of the former, authorizes the adoption on the part of the United States of

These considerations, induced by the relation of the parties and the duty arising therefrom, might well be relied on as grounds for the recovery of the principal of the balance claimed to be owing due those plaintiffs as a result of their transactions with the Government in the matter of, and under, the treaty of June 19, 1818.

Such common ratables with the authorities cited apply with equal force to items III and IV of plaintiffs' claim herein discussed.

The claim for interest as made in the Court of Claims is hereby waived and is recovery of the principal only is sought.

But the considerations above mentioned as reasons for granting relief in this behalf alone.

They are coupled with the proposition that in the valuation of the lands received there was a gain [illegible] a mutual mistake resulting in great loss to these plaintiffs. On both grounds they invoke the power and jurisdiction of this Court to correct the injustice done them.

The relief [illegible] on March 3, 1891 [illegible] by the Court of Claims, if the normal legislation as completed with the same [illegible] [illegible] [illegible] the Court's decision in the light of [illegible] to resolve the difference between the case just cited and the cases at bar, [illegible] contrary to the principles laid down in the cases cited and to the intent of the jurisdictional act.

II

The Claim for Compensation Arising Under the Act of March 3, 1863, 12 Stat. 819

On its face that act purported to be for the benefit of the four bands of Sioux Indians, namely, the Sisseton, Wahpeton, Medawakanton and Wahpekoota bands. Their grievances arose out of the cession of their lands in the State of Iowa and Territory of Minnesota under the treaties of July 23 and August 5, 1851, and were limited to the United States by the Act of February 16, 1861, 12 Stat. 172, in consequence of the Indian outbreak of 1862. The same act had also declared forfeited that part of the Minnesota reservation lands lying south of the Minnesota River.

[illegible] the Act of March 3, 1863, which provided that the President should cause said set apart for the four bands [illegible] of unoccupied lands to sale the United [illegible] State, without [illegible] allotting to each [illegible] are willing to [illegible] pursuant to agreements made [illegible] of good [illegible] lands [illegible] adapted to [illegible] purposes. It is [illegible] upon the face of the record that the [illegible] received the benefits of this act. The [illegible] of the plaintiff bands was [illegible] about [illegible] that of the combined Medawakanton and Wahpekoota bands. Thirteen hundred and six Indians were removed from Fort Snelling, where they had been held as prisoners, to the Crow Creek Reservation on the Missouri River,

set apart by the President under the Act of March 3, 1863. Of these 1,194 were evidently full-blood Medawakantons and Wahpakootas.

Therefore there could not have been to exceed 112 members of plaintiff bands who were at that time removed to Crow Creek Reservation. There is no evidence not failing to be either of the plaintiff bands were ever removed to Crow Creek, or were ever ordered to go there. See findings VI and VII, Record, pp. 41 to 44.

The fact and just conclusion is that the Government through the Secretary of the Interior and the Indian Office knew of the non-occupancy of the Crow Creek lands by the plaintiffs' bands or members of it and did not encourage such occupancy. The Government is therefore estopped from claiming that the plaintiffs shared in the benefits accruing from the Act of March 3, 1863.

Facts of which the court are bound to take notice and which cannot be controverted are treated as admitted for the Government's purposes. Thus, in the Sioux Treaties [illegible] the court will take notice of the Crow Creek reservation on the Missouri River in South Dakota. It will take notice of the fertile character of the soil and region where the reservation is and the fact that the successful growing of crops

We call attention to the fact of the enactment, over the collateral or [illegible] homestead and small [illegible] many of the Western [illegible] States, South Dakota included, and to the fact that [illegible] homestead acts, both made reasonably necessary

because the lands to which they applied were in those regions where the usual homestead of 160 acres was not sufficient to yield support for a family.

Act of March 4, 1909 (35 Stat., 1021).

Act of December 29, 1916 (39 Stat., 862).

Of this character or approaching it were the Crow Creek lands.

Another reason was the limited area of the Crow Creek Reservation and the doubt which must have been felt by the Secretary of the Interior and the Indian Office as to whether it could furnish to each member of the four bands who was willing to adopt the pursuit of agriculture even so limited a tract as "eighty acres of good agricultural lands." There were in the Crow Creek Reservation as finally set apart 275 840.93 acres according to the official plats of public land surveys in the General Land Office. For description of lands so Act of March 2, 1889, 25 Stat., 888, Section 6.

The record fails to show that any lands were ever set apart to the plaintiffs in lieu of the lands of which they were assured under the Act of March 2, 1889.

The lands included in the Lake Traverse and Devils Lake reservations under the treaty of February 19, 1867, 15 Stat., 505, as well as the neighboring lands ceded under the treaty of September 20, 1872 (hereinafter referred to), were already Indian country occupied by plaintiff bands. The two reservations were simply carved out of lands recognized as lands the right to the occupancy of which was in the plaintiffs

This is in effect the finding of the Commission appointed by the Secretary of the Interior under the Act of June 7, 1872, 17 Stat., 281.

Any benefits derived from the treaty of February 19, 1867, were not in consideration of the non-occupancy of the Crow Creek Reservation by the plaintiffs, but upon the express (and different) considerations set forth in Finding X of the Court of Claims, R., pp. 45-47, namely, in consideration of the cession by the plaintiffs of the "right to construct wagon roads, railroads, mail stations, telegraph lines and other public improvements over and across the lands claimed by said bands." And upon the further consideration of the faithful and important services said to have been rendered by the friendly bands of Sisseton and Wahpeton Sioux in the making of said treaty, and also in consideration of the confiscation of all their annuities, reservations and improvements."

The Act of March 3, 1863, was subsequent to the Forfeiture Act of February 16, 1863, 12 Stat. 652, but the forfeiture act furnished no consideration for the later act. Nor was the treaty of February 19, 1867, meant or understood to be as compensation to the plaintiff bands for their failure to receive any benefits under the Act of March 3, 1863.

We have, then, this situation: First, the Act of March 3, 1863, from which the plaintiffs received no benefits. Second, the knowledge of and acquiescence of the Government in the non-occupancy by the plaintiffs of the Crow Creek Reservation. Third, failure on the part of the Government to set apart to the plaintiff

this is true with respect to the lands anywhere available for such disposition on March 3, 1863, and especially less true as we have seen with respect to the lands finally set apart.

But the most practicable way of determining what would be a "reasonable compensation" seems to be to multiply the number of Indians by the number of acres which might be assigned to each member willing to accept an agricultural location. It is probable that out of the whole, or each member of the tribe, could avail of a right to the desired allotment in agriculture, would find several acres to their suitable and well adapted for that purpose.

With these in mind the factors in the problem of compensation, the other might be determined. The Minnesota lands ceded by the plaintiffs were worth $1.25 an acre on March 3, 1863, according to the Court of Claims. The good agricultural lands "well adapted to agricultural purposes" assigned to them by the Act of that very date could not have been of less value.

The plaintiffs claim, moreover, that there is justly due and owing to them from the sum of $40,000 heretofore appropriated by the act before the Court of Claims for payment of Section 177, Revised Code, and the decision of the Court, no claim for interest is here made.

Assuming the correctness of the Court of Claims report on page 10, Record, that "in the face of the record it would not be unjustified in the inference that

the President was remiss in not setting apart 30,720 acres of land in 1865 for the Sissetons and Wahpetons when these Indians were fleeing from captors, etc.[3], complaint is not here made that the President was remiss. But Congress passed the Act of March 3, 1865, for the benefit of all four bands, and in pursuance of that Act and under executive authority, of course, 1,486 Indians had been removed to that reservation in May, 1867, in anticipation of the formal order of the President made later.

III

The Claim for Compensation for Lands Ceded but Not Paid for Under the Treaty of September 20, 1872

As to this item, it is plain that under the findings of the Court of Claims (Finding VI, Record, p. 6) there was a material mistake of fact as to the quantity of land sold and ceded under the treaty. (Kappler's Indian Laws and Treaties, Vol. 2, p. 895.)

The only question was as to value, assuming that the court were right in the value of said lands ceded at the time of the making of said agreement of the 20th of March, 1867, is not sufficiently shown by the evidence.

But the tract was not exceptionally large one, being located in both parties at the time of the treaty between [illegible] acres, but as recited in the treaty [illegible] acres, more or less, and the classes of which the agricultural purposes were of known fertility [illegible] was full discussion of the question at considerable length, some of the Indians who belonging there were [illegible]

3,000,000 acres insisted on $200,000 more than was finally agreed upon, while one of the Commissioners thought that $800,000 for the 3,000,000 acres was too much. We doubt if under the circumstances the plaintiffs are in a position to claim $1.25 per acre, or in fact any greater value than that agreed upon which was at the rate of ten cents per acre.

The case here is different from that involving the value of the Minnesota lands discussed under Item I because there, in finding the value to be $1.25 an acre on March 3, 1863, the court should have found that as the value, or what for the purposes of the case is the same thing, the approximate value on June 27, 1866, the date of the Senate resolution. The material mistake here was as to the quantity of land ceded, and the circumstances tend to negative the idea of a mistake as to the value per acre of the land.

The "satisfactory evidence" then on which to base a judgment in favor of the plaintiffs for the sum of $200,000 on this item of their claim is found in the agreement of the parties after full discussion, for the cession of the lands involved for a sum amounting to ten cents per acre.

We see no such situation as that depicted by the Court of Claims in the opinion (page 61, Record) in regard to the cession of the lands in Dakota outside the Lake Traverse and Devil's Lake reservations. It is respectfully submitted that there is here no "supplication," but the earnest assertion of a plain right, a right to the correction of a very material mistake as to the quantity of land ceded.

If paragraph 6 of Finding XI (Record, pp. 48-49) does not find that both the parties were mistaken as to area ceded by the treaty of September 20, 1872, then we do not know what language could be used to describe a mistake. We quote:

> "It was the understanding and belief of the parties thereto that the approximate area of the tract of land to be sold and ceded by the Indians under said agreement was 8,000,000 acres; whereas the actual area of said land was 11,000,000 acres, approximately 3,000,000 acres more than was believed to constitute its area."

We do not think it was ever claimed that there was misrepresentation as to the number of acres. If there was we waive such claim, but the claim that "both parties were in error as to the acreage of the cession" is not waived; it is founded on the finding of the Court of Claims.

But it is argued that this was a sale in gross without reference in the negotiations or in the consideration to any particular number of acres, or that at most, the estimate of 8,000,000 acres was made for the purpose of description and under such circumstances as to show that the parties intended to fix the sale and cession of that particular body or tract of land for 8,000,000 whatever it might be or however much its real area might fall short of or exceed the estimate.

While admitting that some sales of this character have been upheld, the circumstances so vary as to make difficult the fixing of any other rule than that which follows: "If the difference in the supposed area

and the real is great, and the court is satisfied that the price was in fact influenced by the supposed area, relief has been allowed."

Williston on Contracts, Sec. 1571.
Thomas v. Perry, 1 Pet. C. C., 49.
Mosker v. Lack (Calif.), 181 Pac., 813.
Gardiner v. Koenig (Ind.), 108 N. W., 814.
Nave v. Price (Ky.), 56 S. W., 882.
Newton v. Tolle (N. H.), 94 L. R. A., 769.
Straiss v. Norris, 78 N. J. Eq., 488.
Wardell v. Eccleston, 115 Va., 294.

In the case McMahon v. Terkhorn (Ind.), 116 N. E., 927, 929, the following classification in Harrison v. Talbot, 2 Dana, 268, is quoted with approval:

> "Sales in gross may be subdivided into various subordinate classifications. First, sales strictly and essentially by the tract without reference to the quantities or to the consideration to arise, estimated quantity or price, several, sales of like kind in which, though a supposed quantity is referred to in the contract, the reference was made only for the purpose of description and under such circumstances or in such a manner as to show that the parties intended to risk the contingency of quantity whatever it might be or how much soever it might exceed or fall short of that which was mentioned in the contract. Third, sales in which it is evident from extraneous circumstances of locality, value, price, time, and the conduct and conversation of the parties that they did not contemplate or intend to risk more

than the usual rate of excess or deficit in similar cases or than such as might be calculated on as within the range of ordinary contingency, fourth, sales where, though technically deemed and denominated sales in gross are in fact sales by the acre and so understood by the parties." (Italics ours.)

Can there be any question that the sale here involved falls within the third class if not the fourth?

It is plainly not a case where the parties intended to go so far outside the range of "ordinary contingency" as to risk an excess of 2,000,000 acres in a sale of what was estimated and believed by both to be 8,000,000 acres.

So the difference between the supposed area and the real area was very great, and it must be evident that the price was influenced by the supposed area.

But there are other circumstances as shown by the record.

First, in selling 8,000,000 acres for $8,000,000 it was natural and reasonable that the transaction should be referred to as one in which the plaintiff bands were getting ten cents an acre for their land.

Other sales had been by the acre, and the Senate had originally allowed them 10 cents an acre for their Minnesota Reservation lands under the treaty of July 23, 1851, and 30 cents an acre under the treaty of June 19, 1858. They were therefore familiar with estimates and sales by the acre.

Second, the time was nearly 12 years after the passage of the Senate resolution allowing them 30 cents

an acre for their lands north of the Minnesota River and they certainly would have considered that any less sum than 10 cents an acre for their Dakota lands after this lapse of time would have been unreasonable.

Third, the consideration was evidently the subject of much discussion as appears from the record; some of the Indians wanted $200,000 more for the 5,000,000 acres than was finally agreed upon. But they sold 11,000,000 acres, and instead of getting ten cents per acre, as they supposed, they have been compelled to take 7.3 11 cents per acre. So, here again is involved the element of inadequacy of consideration as bearing upon the understanding of the plaintiff Indians as to the quantity of land ceded and upon their right to relief. That some of the Indians wanted $200,000 more for the supposed 5,000,000 acres is sufficient to induce the court to believe that if the truth had been known, viz., that they were parting with the title to 11,000,000 acres instead of 5,000,000 acres, the sale would not have been made.

Strauss v. Norris, 78 N. J. Eq. *supra*.

If the difference between the real and the represented quantity be very great both parties act obviously under a mistake which it is the duty of a court of equity to correct.

Mosher v. Ladd, *supra*.

Where the parties contract for the payment of a gross sum for a tract or parcel of land upon an estimate of a given quantity the presumption is that the

quantity influences the price to be paid and that the agreement is not one of hazard.

Wardell v. Birdsong, *supra*.

These are some of the "extraneous circumstances" as well as some of the governing legal principles which point irresistibly to the conclusion that the plaintiff bands never for one moment intended to risk the sale of 11,000,000 acres of land for $500,000 upon an estimate and belief by both parties that there were only 5,000,000 acres; and, by the same token, to the conclusion that on this item they are entitled to relief.

And, pray "is they cannot have interest so as to make it more complete and equitable.

But the principles above laid down, in regard to sales alleged to be sales in gross, apply in cases where the parties stand on an equal footing as to knowledge or means of knowledge of value, price, quantity, etc. with how much greater force should they apply here where it is the superior against the inferior, the strong against the weak, the intelligent and cautious against ignorance and improvidence.

The Court of Claims in its opinion refers to the time that has elapsed since this treaty—"More than a half century", but the act under which this case is prosecuted provides: If any such question is submitted to said court it shall settle the rights both legal and equitable of said bands of Indians and the United States, notwithstanding lapse of time or Statute of Limitations.

IV.

Claim for Payment of the Principal of the Trust Fund Created Under the Treaty of July 23, 1851.

Referring again to the treaty of July 23, 1851, out of which arises this claim of the plaintiffs for the principal sum of $1,360,000, the net proceeds of the sale and cession by the plaintiffs to the United States of their lands situated in the State of Iowa and the then Territory of Minnesota:

The extent and value of this cession is of interest from the standpoint of what is just and equitable in transactions between the Government and the plaintiff bands.

The Iowa cession amounted to 2,676,326 acres.

The Minnesota cession to 20,790,747 acres; a total of 23,467,073 acres. (See State maps based on official public surveys, General Land Office). The lands ceded were in two of the richest agricultural States in the Union. Even at $1.25 per acre their value would be $29,333,841 at the time of the cession. But the amount paid for this vast domain of fertile lands was approximately seven cents an acre; it was insignificant compared with the value of the lands ceded.

Is it unreasonable or inequitable to ask that the Government be required to administer its trust according to well-settled principles of equity, and as we shall hope to show according to the law, directly applicable to this case?

lations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys or of any portion, at a lower rate of interest than five per centum per annum." (Italics ours.)

Rev. Stat., Sec. 2069.

The money was received under a treaty for the cession of lands.

The treaty contained a stipulation that the balance of the fund, $1,500,000, should "remain in trust with the United States and five per cent. interest thereon to be paid annually to said Indians for the period of fifty years."

The remaining clause, "which shall be in full payment of said balance, principal and interest" is in conflict with said section 2069 *supra*, for otherwise the language "most safe and beneficial for the fund" is without meaning. Congress could never have contemplated that the payment of interest on any fund arising from the cession of Indian lands and remaining in trust with the Government should operate as a discharge and payment of the principal obligation.

Be it remembered that the relationship here again is that of the superior to the inferior, of the stronger and weaker, and similar to that of guardian and ward.

Re Heff, 197 U. S., *supra*.

Roff v. Burney, 168 U. S., *supra*.

The conduct of the Government here is not different from that of the ordinary trustee, who uses the estate

of the beneficiary for his own personal profit. Manifestly the acquisition of the lands, the creation of a trust fund out of the purchase money to be repaid, by the payment of fifty equal annual installments of interest, were transactions which served to greatly enrich the trustee Government at the expense of its wards the beneficiaries of the trust. The rule that a trustee can make no profit out of his trust springs from his duty to protect the interests of the estate and not to permit his personal interest to in any wise conflict with his duty in that respect.

Magruder v. Drury et al., Trustees, 235 U. S. 106.

It is significant that in Finding VIII (Record, pp. 44-45) the Court of Claims say that as appeared from the evidence "some of the members of plaintiff bands did not understand at the time of making said treaty that the payment of interest on said trust fund for 50 years was to be in full payment of the principal thereof, but understood that at the end of said 50 years the principal was to be paid to said bands, but it does not appear that the provision of the treaty on this point was misunderstood by the chiefs and headmen who represented said bands in the making of the treaty."

Notwithstanding the latter part of the above finding, we can think of no case which makes a stronger appeal for the application of the equitable principles which govern all fiduciary and trust relations. In passing it is observed that the court does not find

affirmatively that the "chiefs and headmen" understood the treaty, but, negatively, only that "it does not appear that the provision of the treaty on this point was misunderstood by the chiefs and headmen. To this we are constrained to add: "Nor does it appear from the finding that the provision of the treaty on this point was understood by the chiefs and headmen."

The finding "from the evidence" is clear, however, that some of the members of the plaintiff bands did not understand that the payment of interest was to be in full payment of the trust fund, "but understood that at the end of said period the principal was to be paid to said bands."

But independently of what some of the members of plaintiff bands understood as to the payment of the principal at the end of the 50-year period, was there not on the part of all the members of such bands, if not on the part of the representatives of the Government, a misapprehension as to their existing legal rights and interests under the law, Section 2069 Rev. Stats., *supra*?

The Act of 1862 makes no limitation as to the time for which investments of funds arising from lands ceded shall be made, nor recognizes any other method of discharging the principal than by paying it.

But of such act and of their rights under it the plaintiff bands were in 1864 presumably ignorant. It may be doubted whether the representatives of the Government in making the treaty knew of its existence.

The maxim, "ignorance of the law is no excuse," has its qualifications. The mistake here is not like one in regard to a general statute or law, merely, but like a mistake as to a private right resulting from the law, as a right of ownership, for example, and "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake."

Williston on Contracts, Section 1580

We may go further. It is not necessary that there be a common or mutual mistake as to the "relative and respective rights" of the parties; but it is necessary that the inequitable conduct of one of the parties should be intentionally misleading, much less that it be actual fraud. It is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements or acts of the other party.

Pomeroy Eq. Juris. Sections 847-848

According to this authority, all or nearly all of the well-considered decisions in which relief has been granted are those in cases where the party fails to understand the legal scope and effect of the transaction entered into, but was ignorant of his own *intended* and *existing legal rights* and interests.

Ibid., Section 849

And, again, "Mistakes therefore of a person with respect to his own private legal rights may be properly regarded, as in great measure they really are, and may be dealt with as mistakes of fact." *Ibid.*

And even more pertinent

> "Where ignorance or misapprehension of the law, even without any positive, incorrect or misleading words or incidental acts, occurs in a transaction concerning the trust between two parties holding close relations of trust and confidence, injuriously affecting the one who reposes the confidence, equity will in general relieve the one who has been injured. The relations of the trustee and *cestui que* trust, guardian and ward and the like are examples."
>
> Pomeroy, Section 848

And such is this case; not only under the relationship of the parties generally as recognized by the courts, but by the very terms of the treaty of 1851, a trust fund was created of the proceeds of the cession of the Iowa and Minnesota lands to the United States. Many years ago this Court laid down a rule governing the interpretation of treaties with the Indians in the following language by Justice McLean:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words have been made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty they should be considered as used in the latter sense. How the words of the treaty were understood by this unlettered people rather than their critical meaning should form the rule of construction."
>
> Worcester v. Georgia, 6 Pet. 515

This opinion was cited and relied on in the comparatively recent case, Delaware Indians vs. Cherokee Nation, 193 U. S., 127. The comment of the Court in the latter case upon the principle laid down by Justice McLean is, in view of the class of treaties with which we are dealing, both interesting and significant. It is:

> "But the learned justice was here dealing with a treaty made between the representatives of the United States and those of the Indians wherein the inequality of the contracting parties in civilization and knowledge of law and the use of language is obvious." (The italics are ours.)

In another case the court discussing the relative situation of the parties to a treaty between the Indians and the United States says: "The parties are not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws."

> Choctaw Nation vs. United States, 119 U. S., 1.
>
> And see Jones vs. Meehan, 175 U. S., 1, *supra*.

Some Authorities Examined

On behalf of the plaintiffs we contend that the claims of the plaintiffs here made and relied on are not in conflict with certain authorities cited by counsel for the Government in the trial of the case before the Court of Claims and by the court itself in its opinion

In the first place the facts are essentially different. Take the case Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.

An action to enjoin the Secretary of the Interior from leasing oil lands for the benefit of the Nation under the Act of 1898 on the ground that under previous treaties and patents the Cherokee Nation had the exclusive right to the use, control, and occupancy of said lands, etc.

The court in denying the claim of the plaintiff refers to the decision in Stephens *vs.* Cherokee Nation, 174 U. S., 445, wherein is discussed the reports of the Dawes Commission of 1894-5 and the Senate Committee of 1894, on the condition of affairs among the Five Civilized Tribes. The Dawes report showed a condition "abhorrent to our institutions." The Senate Committee finds that the lands set apart by the Government were held in trust by the Tribes for all the people of those Tribes, that the trust had not been properly executed.

"What," asks the Senate Committee in its report, "is the duty of the Government of the United States with reference to this trust? While we have recognized these Tribes as dependent nations, *the Government has likewise recognized its guardianship over the Indians* and its *obligation to protect them in their property and personal rights*." (Italics ours.)

Referring to the failure of the Cherokee Nation to carry out the stipulations of the Treaty of 1846 by passing laws for the equal protection and security of

life, liberty and property, the Senate Committee declares that "there appears to be no redress for the Indian deprived of his rights unless the Government does interfere to administer such trust."

Report Senate Committee 377, May 7, 1894, 53d Congress, 2d session.

The Act of June 28, 1898, under which the controversy concerning the leasing of oil lands arose and out of which grew the case, Cherokee Nation vs. Hitchcock, *supra*, is entitled, "An Act for the Protection of the People of the Indian Territory and for other Purposes."

And in this case the court, by Chief Justice White, says:

> "There is no question involved in this case as to the taking of property, the authority which it is proposed to exercise by virtue of the Act of 1898 has relation merely to the control and development of tribal property which still remains subject to the administrative control of the Government * * * * The power to administer upon and guard the tribal property being political and administrative in its nature, the manner of its exercise is for the legislative branch and not for the courts."

And thus instead of being in conflict with any of the items of plaintiff's claim these two cases, Stephens v. Cherokee Nation and Cherokee Nation v. Hitchcock (*supra*), recognize the general principle that the Government is the ultimate trustee for the purpose of safe

guarding and protecting their property and personal rights.

The same principle is involved in Lone Wolf *v.* Hitchcock, 187 U. S., 553, wherein was brought in question the validity of an act of Congress. The act ignored the provisions of Article 12 of the Treaty of 1867 with the Kiowas and other bands, and provided that no treaty for the cession of any part of the reservation should be of any force or validity unless signed by at least three-fourths of all the adult male Indians occupying the same. This Court in rejecting the claim used the following language: "To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians and to deprive Congress in a possible emergency when the necessity might be urgent for a partition and disposal of the tribal lands of all power to act if the assent of the Indians could not be obtained."

Next is the case United States *v.* Old Settlers, 148 U. S., 427.

We think the considerations which governed the court in its opinion in that case are applicable to items I, II, and IV of plaintiffs' claim here. There was first the jurisdictional act under which the suit was brought in the court of claims, second, the Act of March 4, 1927, giving a year in which plaintiffs might bring the case to the court for review.

In the Old Settlers case Congress authorized plaintiffs to bring their action in the Court of Claims.

The act was passed February 25, 1889, 25 Stat., 694, its title being, "An act to authorize the court of claims to hear, determine and render final judgment upon the claim of the Old Settlers or Western Cherokee Indians."

The court in the course of its opinion used the following language: "But we think under all the circumstances disclosed here that Congress being convinced that a mistake had probably been made * * * and desirous, as being the stronger party to the controversy, that that superior justice which looks only to the substance of the right should be done in the premises, voluntarily waived any reliance upon the lapse of time or laches * * * determined to obtain a judicial interpretation of the treaties and laws bearing upon the subject and to be bound by judicial decision in respect to the conclusions flowing therefrom and arrived at upon equitable principles, and that the jurisdictional act passed in effectuation of such intention left it open to the courts to readjust the account notwithstanding the claim might have been theretofore settled. In other words, if the adjustment and settlement were found to have been upon an erroneous interpretation which led to an obvious mistake, then Congress designed that the mistake should be corrected."

The contention of the plaintiffs in each and all the claims herein presented is, we believe, in harmony with the principles and spirit of this excerpt from the opinion in the case of the Old Settlers.

In Conclusion.

The claims of these plaintiffs are not exaggerated. Three of the claims arise out of treaties under the terms of which, and at a trifling cost, the Government was enriched a hundred fold by the acquisition of a vast domain which it disposed of to settlers who in turn through their occupancy and use of the land added billions to the national wealth. But as a natural result of the policy of getting the most possible for the least possible the Indians were impoverished.

The opinion in the case of Jones vs. Meehan, 175 U. S., *supra*, very clearly points out the conditions under which treaties were usually made. But it should be considered also, that the Commissioners employed by the United States were without doubt ambitious to "bring home" a treaty which from the money point of view would be most favorable to their employer. If this be all, the negotiators of the three treaties here involved could certainly "point with pride" to their work. But unfortunately the sharp bargain does not often leave a friend in the party who has been overreached, and, who can say, but that a realization of what the plaintiff bands had been led to sacrifice under the treaties of 1851 and 1858, combined with other grievances, was 'brooded over' by them and led to the savage and destructive outbreak of August 1862, concerning which the opinion of the Court of Claims speaks in such condemnatory terms? It will be recalled that the Civil War was then on, that there were undoubtedly Southern sympathizers in the State of Min-

nesota, who, "taking advantage of these unfortunate circumstances and of the national troubles, worked upon the fears and hopes of the dissatisfied and restive Sioux to make them more and more uncomfortable and unreconciled to the state of things. * * * They (the sympathizers) carried the matter further than they thought to do, and so fanned a fire, wild and destructive, which they could not control or extinguish."

See article, Vol. IX, page 430, Minnesota Historical Society Collections.

But, regrettable as was the terrible outbreak of 1862, these plaintiff bands have not been removed from about the only reservation within their power to make. There were among them the loyal scouts and soldiers to whom, and not to the bands themselves, two payments aggregating $60,000.00 were made by the Government, and this was claimed against the appellee's trust fund provided for by the Act of July 23, 1851. The trust fund was of course for the benefit of the two bands.

In addition the sum of $122,399.12 was expended by the Government for damages growing out of the outbreak, and this too was charged against said trust fund, making a total of $182,399.12 these bands have had as a result of the Indian War of 1862.

The accounts [illegible] and finally settled [illegible] opinion and judgment of the court [illegible] Stanton and Wahpeton Bands of Sioux Indians [illegible] United States, 208 U. S. 501.

We respectfully submit that in each of the four items herein discussed the plaintiffs are lawfully and in equity and good conscience entitled to a reversal of the judgment of the court of claims and to the relief sought.

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Counsel for Petitioners.

ROBERT T. TEDROW, ESQ.
WALTER W. McCASLIN,
of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 596

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIAN, Appellants

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

MOTION TO DISMISS

The Solicitor General, on behalf of the United States, moves that this appeal be dismissed.

The ground of the motion is that the method provided by law for reviewing the judgment of the Court of Claims in this case is by writ of certiorari, petition for which has heretofore been filed and denied.

STATEMENT

The Jurisdictional Act under which the Court of Claims took jurisdiction of this case was the Act of April 11, 1916 (c. 63, 39 Stat. 47), which provided:

> That all claims of whatsoever nature which the Sisseton and Wahpeton bands of

> Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party * * *.

On April 23, 1923, judgment was entered in the Court of Claims in favor of the United States. (R. 63.) On December 24, 1923, these appellants filed in the Court of Claims an application for appeal to this Court, which was denied because not filed within the time prescribed by Section 243 of the Judicial Code. (R. 64.) Thereafter, by an Act of Congress approved March 4, 1927, c. 522, 44 Stat. 1847, it was provided:

> That the plaintiffs or complainants in suit numbered 33731 in the Court of Claims of the United States be, and they are hereby, granted one year within which to appeal from any or all orders, judgments, or decrees rendered against them in the trial of said action heretofore had: *Provided*, That the time within which said appeal may be taken shall begin to run with the date of the approval of this Act.

That Act related to this case. It was passed after the effective date of the Act of February 13, 1925, which abolished appeals from the Court of Claims and provided for review of its judgments by certiorari.

Thereupon, on May 21, 1927, these appellants filed in this Court their petition for certiorari to review the judgment of the Court of Claims

which had been entered April 23, 1923. Their petition proceeded on the theory that the purpose of the Act of March 4, 1927, was to enlarge the time for taking the case to this Court, but not to change the method prescribed by the Act of February 13, 1925. In their supporting brief these appellants, then petitioners, said:

> In proceeding by certiorari rather than by appeal we assume that the term "appeal," as used in the Act of March 4th, is not limited to its technical use, but that the term was employed to cover any method of bringing the case before this Court for review which would be in harmony with the statutes and with the rules of this Court pertaining to petitions for and writs of certiorari to the Court of Claims. Subd. *b* and *c*, Sec. 3, Act February 13, 1925. (Page 3, Petitioners' brief, No. 261, October Term, 1927.)

The brief in opposition for the United States filed in September, 1927, made the same assumption and dealt with the case as if certiorari were the proper method of review.

The petition for certiorari was denied October 10, 1927. (*The Sisseton and Wahpeton Bands of Sioux Indians, Petitioners* v. *The United States*, No. 261, October Term, 1927.)

Meanwhile, on May 21, 1927, these appellants filed in the Court of Claims an application for appeal, which was allowed on June 6, 1927. (R. 65.) On October 28, 1927, after having applied for and

been denied certiorari, these appellants docketed their appeal in this Court.

ARGUMENT

During the period when the law provided for appeals to this Court from judgments of the Court of Claims it was the practice of Congress in enacting special jurisdictional Acts, granting jurisdiction to the Court of Claims, to insert the clause:

> with the right of appeal to the Supreme Court as in other cases.

Notwithstanding the passage of the Act of February 13, 1925, abolishing appeals from the Court of Claims and providing for review of its judgments by certiorari, special jurisdictional Acts have been passed by Congress containing the same phrase. The following is a list of these Acts, together with the wording of the pertinent provisions:

Act of March 3, 1925 (c. 459, 43 Stat. 1133), Kansas or Kaw Indians:

> From the decision of the Court of Claims * * * an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

Act of May 14, 1926 (c. 300, 44 Stat. 555), Chippewas of Minnesota:

> With right of appeal to the Supreme Court of the United States by either party as in other cases.

Act of July 2, 1926 (c. 724, 44 Stat. 801), Citizen Band of Pottawatomies:

> With the right of appeal to the Supreme Court of the United States by either party as in other cases.

Act of July 3, 1926 (c. 734, 44 Stat. 807), Crow Indians:

> With right of appeal to the Supreme Court of the United States by either party.

Act of March 2, 1927 (c. 250, 44 Stat. 1263), Assiniboin Indians:

> With right of appeal to the Supreme Court of the United States by either party.

Act of March 3, 1927 (c. 302, 44 Stat. 1349), Shoshone Indians:

> With right of appeal to the Supreme Court of the United States by either party.

We find no other special jurisdictional Acts enacted since the passage of the Act of February 13, 1925. It is evident that Congress, through force of habit, has continued to use the expression "with right of appeal to the Supreme Court of the United States as in other cases."

It is not reasonable to suppose that Congress, after passing the Act of February 13, 1925, for the purpose of relieving this Court of the burden of hearing appeals from the Court of Claims regardless of the character of the questions involved or the merits of the appeals, recanted and intended to allow all these Indian cases covered by these special jurisdictional Acts to be taken to this Court

as a matter of right. There is nothing about the nature of the cases which would justify it, and the claimants are adequately protected by the right common to all litigants in the Court of Claims to apply to this Court for certiorari. We think all of these jurisdictional Acts should be construed to use the word "appeal" in a broad or popular sense, and to allow review by this Court only by the method common to litigants "in other cases."

The present case has some special features. It may be argued, because of the peculiar nature of the legislation affecting this case, that Congress intended by the Act of March 4, 1927, to revive the right of appeal which had formerly existed, and that it clearly was not the intention by the Act of March 4, 1927, to deal with this case exactly as with other litigation in the Court of Claims, because that Act grants a year from its passage within which to take steps for review by this Court, while the Act of February 13, 1925, limits the time for filing petitions for certiorari to three months. Notwithstanding this situation, we believe that the Act of March 4, 1927, should be construed merely to enlarge the time for seeking review in this Court and not to provide the old method of appeal. Such a construction works no hardship on these appellants, unless the Court denied their petition for certiorari on the ground that appeal was the proper method of review.

Their petition for certiorari seems to have been considered by the Court on the assumption that

review by certiorari was permitted. They have had their day in court and, after what has occurred, it is straining matters to force this Court to consider this case on appeal.

The question here presented has so far arisen only in this case. In none of the cases under the other special jurisdiction Acts above listed, enacted since February 13, 1925, has a judgment been entered and none of the claimants has yet been led to rely on a supposed right of appeal.

If the word "appeal," as used in the Act of March 4, 1927, applicable to this case, is to be given a broad rather than a technical meaning and construed to relate to the method of review prescribed by the Act of February 13, 1925, it will follow, of course, that all the other jurisdictional Acts above listed should be so construed; but if in the present case it is held that the method of review is by appeal and not by writ of certiorari, it may be desirable for the Department of Justice to call the situation to the attention of Congress with a view to legislation affecting the other cases.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
GEORGE T. STORMONT,
Attorney.

JANUARY, 1928.

APR 30

No. 595

In the Supreme Court of the United States

October Term, 1937

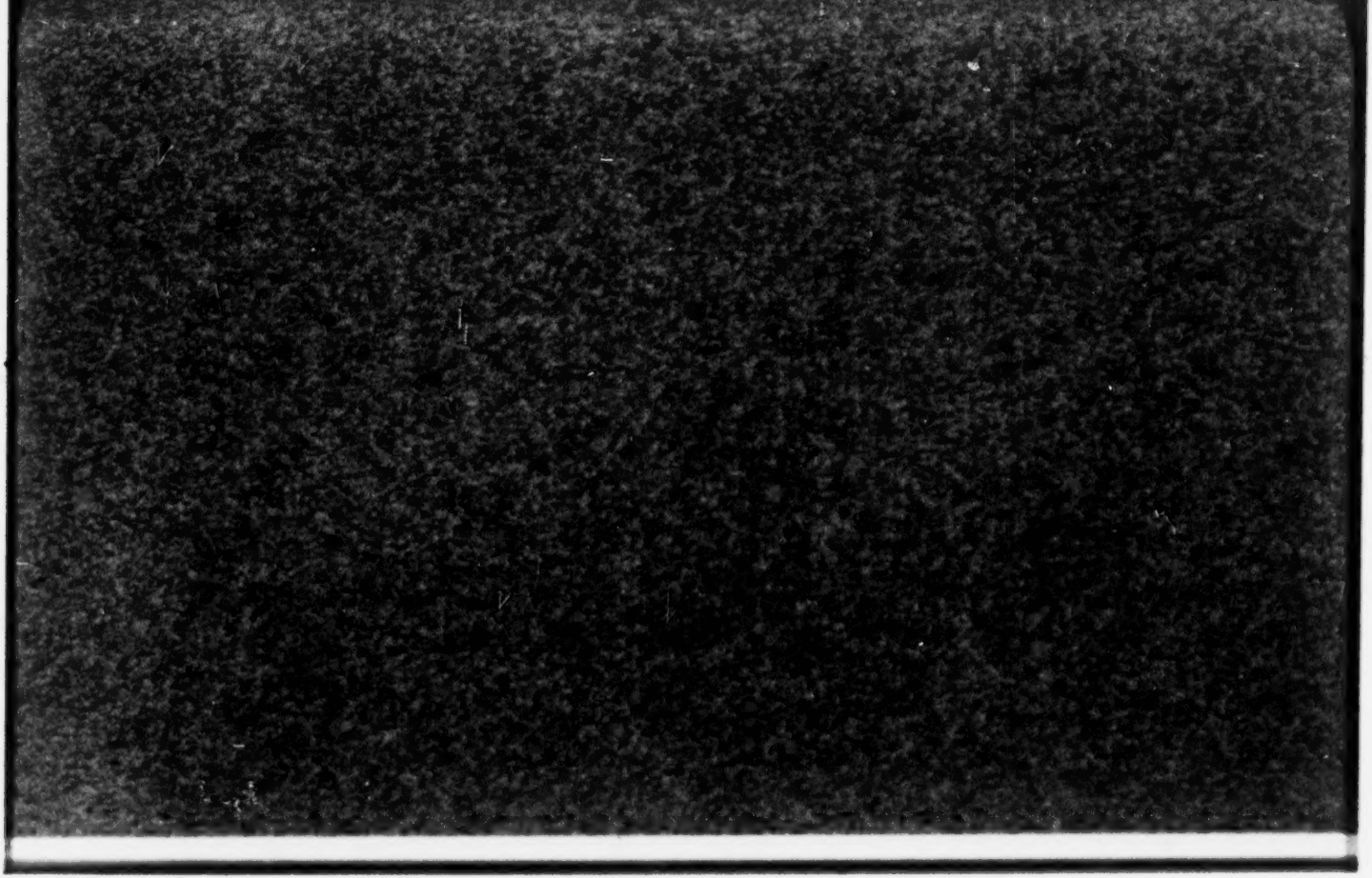
THE CHEMICAL AND FARMERS BANK OF NEW YORK, Appellant,

vs.

THE UNITED STATES,

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.



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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 596

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS, Appellants

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION

The opinion of the Court of Claims in this case is reported in 58 Court of Claims, 302, and appears at page 50 of the record herein.

JURISDICTION

The Act of April 11, 1916 (c. 63, 39 Stat. 47) is the Jurisdictional Act under which this suit was instituted in the Court of Claims. Such Act appears in the Findings of Fact (R. 31) and is in part as follows:

> That all claims of whatsoever nature which the Sisseton and Wahpeton bands of Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all claims of said bands against the United States and also any legal or equitable defense, set-off, or counterclaim which the United States may have against said Sisseton and Wahpeton bands of Sioux Indians, and to enter judgment, and in determining the amount to be entered herein the court shall deduct from any sums found due said Sisseton and Wahpeton bands of Sioux Indians any and all gratuities paid said bands or individual members thereof subsequent to March third, eighteen hundred and sixty-three: *Provided*, That in determining the amount to be entered herein, the value of the land involved shall not exceed the value of such land on March third, eighteen hundred and sixty-three * * *.

Suit was instituted in the Court of Claims on March 17, 1917, and an amended petition was filed March 26, 1920. (R. 2, 3.) On April 23, 1923, the Court of Claims made findings of fact (R. 30) and conclusions of law and entered judgment thereon dismissing the petition (R. 63, 64). On December

24, 1923, the appellants applied for an appeal to this Court, which the Court of Claims on January 14, 1924, denied for the reason that "this application was not filed within the time prescribed by the statute, section 243 of the Judicial Code." (R. 64.) Then came the Act of February 13, 1925, which abolished appeals from the Court of Claims and provided for review of its decisions by certiorari. By an Act of Congress approved March 4, 1927 (c. 522, 44 Stat., pt. 3, p. 1847), it was provided that—

> the plaintiffs or complainants in suit numbered 33731 in the Court of Claims of the United States be, and they are hereby, granted one year within which to appeal from any or all orders, judgments, or decrees rendered against them in the trial of said action heretofore had: *Provided*, That the time within which said appeal may be taken shall begin to run with the date of the approval of this Act.

On May 21, 1927, appellants filed in this Court their petition for certiorari, which was denied by this Court on October 10, 1927 (*The Sisseton and Wahpeton Bands of Sioux Indians, petitioners*, v. *The United States*, No. 261, October Term, 1927). The opposition to that petition assumed that certiorari was the proper method of review.

Meanwhile, on May 21, 1927, appellants filed in the Court of Claims an application for appeal, which was allowed on June 6, 1927 (R. 65) and on October 28, 1927 (after their petition for certiorari

had been denied) this appeal was docketed in this Court. The United States filed a motion to dismiss this appeal supported by a printed argument, decision of which was deferred until the hearing on the merits.

Since the Act of February 13, 1925, was passed, Congress has passed a number of jurisdictional Acts granting to the Court of Claims jurisdiction to hear Indian claims. In all of them it has provided that there shall be a right of "appeal"; in some, the phrase is "with right of appeal as in other cases." These are set forth in the brief on motion to dismiss. Such statutes should be construed to use the word "appeal" in a broad sense, and there is no reason to believe that Congress intended to abrogate the rule recently adopted, that review of Court of Claims decisions shall be on certiorari.

The present case is somewhat different. A right of appeal once existed, and the jurisdictional Act may be construed to revive that right in its original form. An additional argument to support this is found in the fact that this Act gave a year after its passage for appeal, whereas under the Act of February 13, 1925, certiorari must be applied for within three months, thus showing the intention of Congress to give this case peculiar treatment.

For these reasons the Act of March 4, 1927, may be distinguished from the other special jurisdictional Acts passed since February 13, 1925, and jurisdiction on appeal in this case sustained without holding that appeal, instead of certiorari, is proper in the other cases.

The motion to dismiss was made with a view to obtaining some expression from the Court which would throw light on the whole group of jurisdictional Acts, and lead possibly to additional legislation if necessary to restore the operation of the Act of February 13, 1925, in those cases remaining undecided in the Court of Claims.

We are bound to admit that the weight of the argument is with the contention that Congress intended, in this single case, to revive a right of appeal, and not to limit the claimants to certiorari. The point is submitted on this statement and the material in the motion to dismiss.

QUESTIONS PRESENTED

The amended petition filed in the Court of Claims sets forth 10 items which appellants claim they were entitled to recover from the United States. (R. 2–30.) The Court of Claims held that appellants were not entitled to recover anything. (R. 64.) In this appeal the appellants seek to review the decision of the Court of Claims as to only 4 items. (Appellants' Brief, pp. 3, 4, and 6.) While each item of claim is based upon different facts, there is one question of law controlling as to all of them. That question is whether, under the Jurisdictional Act, the Court of Claims had jurisdiction to go behind treaties and statutes and permit the appellants to recover amounts in excess of those provided for by such treaties or statutes because of some supposed mistake of fact,

inadequacy of consideration or lack of equity, or was authorized to recognize only rights accruing according to ordinary principles of law or equity under the treaties or statutes.

STATEMENT

It is believed that in this case it will aid the Court if the facts as to each of the four claims here questioned by appellants are stated separately. The able opinion of Judge Booth in the Court of Claims gives a clear picture of the controversy.

1. APPELLANTS' CLAIM FOR ADDITIONAL COMPENSATION FOR LANDS CEDED UNDER THE TREATY OF 1858

In their petition filed in the Court of Claims appellants state their claim in substance as follows (Claim 3, R. 11–16):

By a treaty of July 23, 1851, appellants agreed to cede to the Government all their lands in the State of Iowa and all of their lands in the Territory of Minnesota lying east of a line described therein. The Government agreed to pay certain money and to set apart a strip 10 miles wide on both sides of a certain designated portion of the Minnesota River, the same to be a home for said Indians. In the lands so reserved there was 1,120,000 acres, which were of the value of $1.25 per acre as of March 3, 1863. The United States Senate amended this treaty on June 23, 1852, and the same was submitted to certain of appellant bands of Indians on September 8, 1852; but of the original thirty-five In-

dians of the appellant bands authorized to act in this matter only thirteen signed said treaty as amended and none were authorized by said appellants to sign such amended treaty. Appellants therefore claim that there was no other treaty than that of 1851 affecting said 1,120,000 acres of land and that they did not consent to any sales of their lands at either 10¢ or 30¢ per acre by treaties dated June 19, 1858, as found by the Senate in the resolution of June 27, 1860. Appellants also say that they have been paid some money for said lands, but that they are not sure as to the exact amount thereof. They claim $1,400,000 (being for 1,120,000 acres of land at $1.25 per acre) less $735,097.35 (the amount they think they have been paid), leaving a balance which they claim due of $664,902.65, plus interest thereon at 5 per cent per annum from March 3, 1863.

In their brief filed on this appeal the appellants contend that the Court of Claims found that the appellants made a treaty with the United States relative to said 1,120,000 acres of land in Minnesota on June 19, 1858, and that pursuant to said treaty the Senate by resolution of June 27, 1860, declared the appellants' title to said lands to be good and valid, and that they would be allowed 30¢ per acre for the lands lying north of the Minnesota River. In said brief they claim that they owned 569,600 acres of land north of said River and that they were paid $170,880 therefor at the rate of 30¢ per acre,

and that the Court of Claims found that the value of said lands on March 3, 1863, was $1.25 per acre. Appellants, therefore, say that the $1.25 per acre must have been the value of the land on June 27, 1860, the date of the Senate resolution. (Appellants' Brief, pp. 3, 4.) Appellants, therefore, claim that the Court of Claims erred in not holding that there was a mistake upon the part of appellants and a mutual mistake between the parties to said treaty as to the value of said land, and that the Court of Claims also erred in holding that appellants were not entitled to recover the difference between 30c and $1.25 per acre (Appellants' Brief, p. 4) for said 569,600 acres, or a total of $541,120 (Appellants' Brief, p. 3). They also contend that the Jurisdictional Act under which this suit was brought meant that appellants were to be allowed payment of the value of said lands as of March 3, 1863.

The findings of the Court of Claims upon this claim may be summarized as follows:

> The Sisseton and Wahpeton and the Medawakanton and Wahpakoota Bands of the Sioux Tribe of Indians, prior to July 23, 1851, had a habitat along the upper Mississippi River, most of them living on the west side of the River, but some few of the Medawakanton and Wahpakoota Bands on the east side of the River. They were known and spoken of as the Eastern or Minnesota Sioux, and the Government designated them as "Sioux of the Mississippi" to distinguish

them from other bands of the same tribe. (R. 32.)

The Sisseton and Wahpeton Bands, by a Treaty of July 23, 1851 (10 Stat. 949), and the Medawakanton and Wahpakoota Bands by a Treaty of August 5, 1851 (10 Stat. 954), for certain considerations ceded to the United States all of their lands in the Territory of Minnesota and the State of Iowa. (R. 32.) By article 3 of each of these treaties, as originally drawn and executed, a reservation was set apart for said Indians along the Minnesota River, and the four bands were thereupon removed to their respective reservations, after which the Sissetons and Wahpetons were known as the upper bands and the Medawakantons and Wahpakootas as the lower bands. (R. 33.)

The Senate, when the proposed treaties came before it for ratification, amended them by striking out article 3, providing for the reservations on the Minnesota River, and substituting a provision that the Indians should be paid at the rate of ten cents per acre for the lands of said reservations, such payment, under each treaty, to be in lieu of the reservation originally provided for by the treaty, and to be added to the trust fund provided by the treaty for the Indians, and the President was authorized, with the assent of the Indians, to set apart for them another reservation outside of the territory ceded to the Government by the said treaties. Additional authority was also granted to the President with the consent of the Indians

to vary the conditions of the treaties. (R. 33.)

The Indians accepted the Senate Amendment, and the treaties as amended were ratified by them on September 4th and 8th, 1852 (10 Stat. 952, 958). (R. 34.)

The consideration of ten cents per acre provided for by the Senate amendment to the treaties, for the lands of the reservations on the Minnesota River originally proposed by the treaties, was paid to the bands of Indians by its inclusion in the trust funds provided by the treaties for said bands; but no tract or tracts of lands for said bands were ever set apart by the President under the provisions and authorization of the treaties as amended. The Indians continued to live on the lands of the reservations on the Minnesota River originally proposed in the treaties, and by Act of Congress approved July 31, 1854 (c. 167, 10 Stat. 315, 326), the President was authorized to confirm said reservations to said bands. No formal action under this authorization appears to have been taken by the President, but the Indians were allowed to remain on these reservations. (R. 34.)

By similar treaties of June 19, 1858 (12 Stat. 1031, 1037), between the United States and the four Indian bands it was agreed and provided that those portions of the reservations which lay on the south side of the Minnesota River should constitute reservations for said bands, and that allotments in severalty should be made to the Indians from said

lands, any remaining portions thereof to be held in common by the respective bands "as other Indian lands are held." (R. 34.) It was also provided that the questions of the titles of the Indians to the whole of said reservations, and the disposition to be made of the portions of them on the north side of the river, and the prices therefor, should be left to the United States Senate for decision. Pursuant to this provision the Senate, by resolution of June 27, 1860 (12 Stat. 1042), declared that the Indians had a just and valid right and title to the whole of said reservations, and that they should be allowed the sum of thirty cents per acre for the portions thereof lying on the north side of the river. The portion of the reservation of the Sisseton and Wahpeton Bands lying on the north side of the river consisted of 569,600 acres, for which they were paid at the rate of thirty cents per acre, or $170,880, such payment being provided for by the Act of March 2, 1861 (c. 85, 12 Stat. 221, 237). Subsequently the Sisseton and Wahpeton Indians received from the sale of the lands of their reservation lying on the south side of the Minnesota River, under the Act of March 3, 1863 (c. 119, 12 Stat. 819), the sum of $647,457.93, making a total of $930,337.93 received by them for and on account of the lands of their reservation. The entire reservation comprised 1,120,000 acres, and the value thereof on March 3, 1863, was $1.25 per acre, or a total of $1,400,000. (R. 34-35.)

In August, 1862, there was an outbreak of the Sioux Indians in Minnesota, including the Sisseton and Wahpeton Bands, during which outbreak a large number of white settlers were massacred and a great amount of property destroyed. In consequence of this outbreak Congress, by Act of February 16, 1863 (c. 37, 12 Stat. 652), abrogated and annulled all treaties between said bands of Indians and the United States so far as said treaties purported to impose any future obligation on the United States, declared all lands and rights of occupancy within the State of Minnesota and all annuities and claims theretofore accorded to said Indians to be forfeited to the United States, and provided for payment of the damages suffered by the citizens in said outbreak out of the funds in the hands of the Government belonging to said bands. (R. 35–36.)

2. APPELLANTS' CLAIM FOR COMPENSATION ARISING UNDER THE ACT OF MARCH 3, 1863 (12 STAT. 819)

This claim is stated by appellants in their petition filed in the Court of Claims in substance as follows (Claim 1, R. 4–8):

That under the Act of March 3, 1863, the President was directed to assign and set apart for the Sisseton and Wahpeton bands (appellants herein) and for the Medawakanton and Wahpakoota bands of Sioux Indians a tract of unoccupied land outside the limits of any State sufficient in extent to

enable him to assign to each member of said bands (who is willing to adopt the pursuit of agriculture) 80 acres of good agricultural lands, the same to be well adapted to agricultural purposes. They also alleged that said Act was mandatory and that the President set apart a tract for the Medawakanton and Wahpakoota bands, by an Executive Order dated July 1, 1863, but failed to comply with said Act in setting apart a tract for the appellants. It is further alleged that the tract so set aside was not intended for appellants and was only of sufficient area to provide for 1,306 members of the other two bands of Indians who had been removed to and arrived at said tract prior to said Executive Order. Appellants also claim that this land at Ushers Landing, Dakota Territory, was sandy and unfit for cultivation and the Indians who went to said tract were later removed to another tract at Niobrara, Nebraska, but that no member of appellants was located or received land either at Ushers Landing, Dakota, or Niobrara, Nebraska, and it was not intended that appellants should receive land in either of said areas as they were only of sufficient size to care for the Indians already removed who were of the other bands.

Appellants also allege in said petition that they were not given any lands under the treaty of February 19, 1867, to satisfy their claims under the Act of March 3, 1863, for the reason that the tracts set aside at Devil's Lake and the Lake Traverse Reservations

> under the treaty of 1867 already belonged to appellants and therefore could not have been given in lieu of their claim under the Act of 1863. They further allege that the agreement of September 20, 1872 (15 Stat. 505), provided nothing in lieu of their claim under the Act of 1863 since the agreement of 1872 provided for the retention or selling of lands which appellants already owned. Appellants therefore claim that on March 3, 1863, there were 4,524 members of their bands, all of whom were willing to adopt the pursuit of agriculture, and that at the rate of 80 acres for each member there should have been set aside 361,920 acres, which were of the value on March 3, 1863, of $1.25 per acre. They therefore claim they should recover $452,400 with interest at 5 per cent thereon from March 3, 1863.

In their brief on this appeal appellants contend that under the findings made by the court it is shown that no lands were actually set apart to them in accordance with the provisions of the Act of March 3, 1863, and that at such time they were entitled, upon an allowance of 80 acres for each member, to 322,080 acres of land at the price of $1.25 per acre, or the sum of $402,600. (Appellants' Brief, pp. 3 and 5.)

Upon this claim the findings made by the Court of Claims may be summarized as follows:

> In further consequence of said outbreak and of the Act of February 16, 1863, Congress, by Act of March 3, 1863 (c. 119, 12

Stat. 819), provided that the President should "assign and set apart for the said Sisseton, Wahpeton, Medawakanton, and Wahpakoota Bands of Sioux Indians a tract of unoccupied land outside the limits of any State, sufficient in extent to enable him to assign to each member of said bands (who are willing to adopt the pursuit of agriculture) eighty acres of good agricultural lands, the same to be well adapted to agricultural purposes." (R. 36.)

Pursuant to the provisions of this Act, a tract of land was shortly thereafter selected for said bands of Indians at Crow Creek on the Missouri River in Dakota Territory. At or about this time there were being held by the United States military authorities at Fort Snelling, Minnesota, as prisoners, a total of 1,601 members of the four bands of Indians, of which 1,489 were full-blood Indians and 112 half-breeds. Of the full-blood Indians 1,194 belonged to the Medawakanton and Wahpakoota Bands, and the remaining 295 to the Sisseton and Wahpeton Bands. In May, 1863, these prisoners, with a few exceptions, were removed to the tract of land selected at Crow Creek for the bands, 1,306 of them arriving there May 30th. On or about July 1st, following, a tract of land at that point was formally set apart for said Indians. (R. 36–37.)

Military operations were continued against the hostile members of said bands until the latter part of 1864, by which time most of them were driven out of the

State of Minnesota, some retreating to the west of the Missouri River and some escaping north into Canada. After the cessation of military operations against them, some of them returned eastward, and by the latter part of 1866 there were in the vicinity of Fort Wadsworth, in the eastern part of Dakota Territory, from 600 to 800 members of the Sisseton and Wahpeton Bands. An unsuccessful attempt was made by the Government to negotiate a treaty with these fragments of said bands, for the setting apart of a reservation for them and the extinguishment of their claim to lands in Dakota Territory, which claim was considered of doubtful character because said lands were also claimed by other tribes or bands of Indians. The greater part of the members of said Sisseton and Wahpeton Bands, after the cessation of military operations against them, gathered and settled in the vicinity of Fort Wadsworth, where, with the acquiescence of the Government, they remained until the Lake Traverse and Devils Lake reservations were set apart for them in 1867. It does not appear that any material number of additional members of the Sisseton and Wahpeton Bands ever went to live on the Crow Creek reservation set apart under the Act of March 3, 1863, or that any other lands were set apart for the bands under said Act; nor does it appear how many of the members of said bands were willing to adopt the pursuit of agriculture following said Act of March 3, 1863. (R. 37–38.)

By Article II of the treaty of February 19, 1867 (15 Stat. 505, 506), the Sisseton and Wahpeton Bands ceded to the United States the right to construct wagon roads, railroads, mail stations, telegraph lines and other public improvements over and across "the lands claimed by said bands," which were described, and in consideration of this cession by said bands and "of the faithful and important services said to have been rendered by the friendly bands of Sisseton and Wahpeton Sioux" represented in the making of said treaty, and "also in consideration of the confiscation of all their annuities, reservations and improvements," it was provided that there should be set apart as permanent reservations for such members of said bands as had not been sent to the Crow Creek reservation, two reservations consisting of certain portions of the lands referred to in Article II of said treaty as claimed by said bands, which became known as the Lake Traverse and the Devils Lake Reservations. (R. 39–40.)

3. APPELLANTS' CLAIM FOR COMPENSATION FOR LANDS ALLEGED TO HAVE BEEN CEDED BUT NOT PAID FOR UNDER THE TREATY OF SEPTEMBER 20, 1872

This claim is stated in appellants' petition in the Court of Claims in substance as follows (Claim 2, R. 8–11):

That under the agreement of September 20, 1872, as amended May 2, 1873, appellants ceded to the Government a tract of land estimated by the commissioners who negotiated

the agreement on behalf of the Government to contain 8,000,000 acres of land and that compensation was made by the Government to appellants on that basis; that said tract in fact contained 11,000,000 acres; that the appellants were paid for said 8,000,000 acres the sum of $800,000, or 10c per acre, which was but a small portion of the value on March 3, 1863, and the price was inadequate and the treaty unjust and inequitable; that appellants believed they were ceding only 8,000,000 acres, and they were misled by said commissioners as to the actual acreage, and they did not intend to cede more than 8,000,000 acres. They also allege in said petition that but few of the Indians whose names appear to be signed to said treaty actually signed the same; that, because of their inability to understand the English language, advantage was taken of them, and that in fact certain of said Indians were actually forced to sign said treaty. They therefore claim they should recover $1.25 per acre for 3,000,000 acres, and $1.15 per acre for 8,000,000 acres (being the difference between the 10c paid and $1.25 fair value), a total of $12,950,000, with interest thereon at 5 per cent per annum from May 2, 1873.

In their brief in this case appellants contend that under the findings of fact made by the Court there was a mutual mistake of fact as to the quantity of land ceded by the treaty of September 20, 1872, and that under the Jurisdictional Act the Court of Claims should have awarded them compensation at

the rate of 10 cents per acre for the 3,000,000 acres of land in excess of 8,000,000 acres (Appellants' Brief pp. 3 and 5), it being contended that, while the Court of Claims also found that the value of said land was not proven, that the court should have rendered judgment for the 3,000,000 acres of land at the rate of 10 cents per acre.

The findings of the Court of Claims as to this item of the claim are summarized as follows:

> By Act of June 7, 1872 (c. 325, 17 Stat. 281), the Secretary of the Interior was directed to examine and report to Congress what title or interest the Sisseton and Wahpeton Bands had to any portion of the land mentioned and particularly described in the second article of the treaty of February 19, 1867, except such rights as were secured to them by the third and fourth articles of said treaty setting apart the Lake Traverse and Devils Lake reservations for them, and also to examine and report "whether any, and if any, what, compensation ought, in justice and equity, to be made to said bands of Indians respectively, for the extinguishment of whatever title they may have to said lands." The Secretary appointed a commission to make a full investigation of the Indian title, and if it found such title to be valid and complete, to negotiate for the relinquishment of the same upon terms at once favorable to the Government and just to the Indians. On October 3, 1872, the commission, after investigation, reported that prior to the Treaty of February 19, 1867, the title of the

Sisseton and Wahpeton Bands to the tract of land in question was doubtful, owing to the fact that up to some time prior to that treaty other bands of Sioux Indians claimed a common interest in the lands, but that the United States had by that treaty recognized the Indian title to this tract of land as being in the Sisseton and Wahpeton Indians, and was thereby estopped from later denying their title to it. The commission reported that it estimated the tract of land to have an area of over eight million acres, and that the value of the right and title of the plaintiff bands therein ought to be fixed at the sum of $800,000, though the Indians urged $200,000 more than this sum, and one of the commissioners was of the opinion that $800,000 was more than ought to be allowed under the circumstances. (R. 41.)

With its report the commission submitted a proposed treaty which they had negotiated with the said Indians under date of September 20, 1872 (Kappler's Indian Laws and Treaties, Vol. 2, page 1057), under the terms of which said bands were to "cede, sell, and relinquish to the United States all their right, title, and interest in and to" the tract of land in question, "as well as all lands in the Territory of Dakota to which they have title or interest," except the said Lake Traverse and Devils Lake reservations set apart by the Treaty of February 19, 1867. The principal, but not the only, consideration was to be $800,000, payable in annual installments of $80,000 each, without interest.

This agreement, or proposed treaty, was submitted to Congress and by Act of February 14, 1873 (c. 138, 17 Stat. 437, 456), Congress confirmed merely the portion of it providing for the cession of the lands and the consideration of $800,000, and the method of its payment, and appropriated for the payment of the first $80,000 installment. The agreement as thus amended and confirmed by Congress was ratified by the Indians on May 2, 1873 (Kappler's Indian Laws and Treaties, Vol. 2, page 1059), and Congress thereafter annually appropriated for the remainder of the annual installments due the Indians under the agreement, it being specified in the Appropriation Acts that the sum appropriated was the current installment of the amount provided by said agreement "for the relinquishment by said Indians of their claim to or interest in the lands described in the second article of the treaty made with them February nineteen, eighteen hundred and sixty-seven." 18 Stat. 167, 441; 19 Stat. 192, 287; 20 Stat. 81, 310; 21 Stat. 127, 497; 22 Stat. 81. (R. 42.)

In the making of the agreement of September 20, 1872, it was the understanding and belief of the parties thereto that the approximate area of the tract of land to be sold and ceded by the Indians under the agreement was eight million acres, whereas the actual area of said land was eleven million acres, or approximately three million acres more than was believed to constitute its area.

The Court of Claims found that the value of the land either at the time of the making of the agreement or on March 3, 1863, was not satisfactorily shown by the evidence. (R. 42–43.)

4. APPELLANTS' CLAIM FOR PAYMENT OF THE PRINCIPAL OF THE TRUST FUND CREATED UNDER THE TREATY OF JULY 23, 1851

In the petition filed in the Court of Claims this claim is stated substantially as follows (Claim 4, R. 16–18):

> That the treaty of July 23, 1851, provided that $1,360,000 (which was part of the money consideration for the cession by appellants for certain lands) (R. 13) should remain in trust with the United States and 5 per cent interest thereon should be paid annually to appellants for the period of fifty years commencing July 1, 1852, which should be in full payment of said balance, principal, and interest (R. 13); that when said treaty was made appellants did not understand, nor in fact knowingly agree, that the fifty annual interest payments should be in full payment for both principal and interest, but understood that the principal was to remain in trust and to be paid to the Indians at the end of the 50-year period; that the treaty was unconscionable and unfair and that the Court of Claims has the right under the Jurisdictional Act to consider the unfairness in equity and unconscionableness of said treaty.

> Appellants further allege that the treaty as drawn was confusing and that the farmers drew said treaty in such form in order to confuse them and to defeat them in their rights and that in equity and good conscience appellants should recover said sum of $1,360,000 with interest thereon at 5 per cent per annum from July 1, 1901, the date when the principal became due.

In their brief in this case appellants contend that in view of the findings made by the Court of Claims such court erred in failing to hold that the appellants were at the time of making their treaty mistaken as to their rights under the law. (Appellants' brief, pp. 4 and 5.)

The findings made by the Court of Claims upon this item are in substance as follows:

> The Treaty of July 23, 1851, provided for the creation of a trust fund from the funds provided to be paid to the Sisseton and Wahpeton Bands for their cession of lands to the Government under the treaty, this trust fund to be held by the Government and five per cent interest thereon paid annually to the Indians for a period of fifty years, and the payment of this interest was to be in full payment of and to extinguish the trust fund. Under the treaty as submitted to the Senate for ratification the amount of this trust fund would have been $1,360,000, but under the treaty as amended by the Senate and adopted by the parties thereto it was increased to

$1,472,000. Prior to the outbreak of 1862 and the Act of February 16, 1863, annulling all treaties between the Government and the Sisseton and Wahpeton Indians, and forfeiting all annuities and claims theretofore accorded the Indians, the Government had accounted to the Indians for the interest on the trust fund, and notwithstanding the forfeiture of their rights by the Act of February 16, 1863, the Government has, under subsequent Acts of Congress, also accounted to the Indians for the interest on the trust fund for the remainder of the fifty-year period, less the amounts paid to citizens for damages sustained by them by reason of the outbreak. No payment has been made by the Government to the Sisseton and Wahpeton Indians for or on account of the principal of the trust fund. (R. 38.)

The Court of Claims found that some of the members of the Sisseton and Wahpeton Bands did not understand, at the time of the making of the Treaty of July 23, 1851, that the payment of interest on the trust fund for fifty years was to be in full payment of the principal thereof, but understood that at the end of the fifty-year period the principal was to be paid to the Indians, but further found that it did not appear that the provision of the treaty on this point was misunderstood by the chiefs and headmen who represented the Indians in the making of the treaty. (R. 38–39.)

SUMMARY OF ARGUMENT

The Jurisdictional Act allows the Court of Claims to award judgment only for amounts due "under any treaties or laws of Congress." No treaty may be disregarded or set aside because of alleged mistake, or inadequacy of consideration, or lack of fair dealing.

All four claims now urged are based on the theory that the Jurisdictional Act in some way broadened the appellants' rights or created new rights. The Jurisdictional Act merely provided a remedy for existing rights created by prior treaties or statutes.

The findings show that the appellants have heretofore received all to which existing treaties or statutes entitled them.

In the first item here urged by appellants, they claimed in the petition filed in the Court of Claims the value of certain lands which, they say, were allotted to them by the treaty of 1851. The Court of Claims has found that by valid amendments the allotment was changed and by subsequent treaties the questions of title, disposition, and price of the lands involved were left to the Senate for determination. The Senate has acted and the amount fixed by it has been paid. The appellants now attempt to base their claim upon an alleged mistake as to such price because the Senate fixed the value as thirty cents per acre in 1860 and the Court of Claims has found the value in 1863 to be $1.25 per acre. The United States contends there was no

mistake. The power to decide was conferred without restriction upon the Senate. It has acted, and its action, being in no manner impeached, must stand.

In the second item here in question a claim is made for the value of lands which appellants say the statutes required the President to set aside for them, but which were never so set aside. Although Congress authorized the President to set aside lands for those Indians who were willing to adopt the pursuit of agriculture, and the area so set aside was not sufficient to allot eighty acres to each member of appellant tribes, no liability results upon the United States, because it was not shown how many Indians were willing to adopt the pursuit of agriculture, and it appears that all who applied for allotments were cared for, and that those who did not go to the Crow Creek Reservation had other provision made for them later. The facts found by the Court of Claims with reference to the insurrection then being waged by these Indians and the necessity of extended military operations against them and the conditions attending such situation further negative any liability upon the United States because of any failure to make allotments at that time.

In the third item appellants claimed that they ceded certain lands to the United States at ten cents per acre, which lands were represented to and believed by them to contain only 8,000,000 acres;

that in fact there were 11,000,000 acres, and that this treaty was not really signed by many whose names appear upon it; that some were forced to sign, and advantage was taken of them, and they were misled by representatives of the United States as to the acreage. They claimed an addition to the money already paid for the 8,000,000 acres and the full value of the 3,000,000 acres. The findings of fact contain nothing to sustain the alleged misrepresentation, coercion, or improper conduct. Appellants now claim a mutual mistake as to the acreage and that they should recover ten cents per acre for the 3,000,000 acres, although they failed to prove the value of the lands. This claim is not one under the treaty, but contrary to it. The transaction involved was not a sale of land by the acre, but was a release by appellants for a lump sum of their rights in certain designated areas described by metes and bounds, the acreage of which was unknown, and an error in the mind of one or both of the parties as to the approximate number of acres involved would not permit appellants to recover here.

The fourth item involves a trust fund created by the treaty of 1851. The treaty provided that payment of interest thereon at five per cent per annum for fifty years should be in full payment of and extinguish the principal. Such interest has been paid. The appellants claimed in their petition that the treaty was confusing and was drawn with the intent to confuse; that it was unconscion-

able, and they did not understand it; and that, therefore, they should have a judgment for the principal. The Court of Claims has found no unfair dealing upon the part of the United States, but has found that the duly authorized representatives of appellants, who negotiated the treaty, fully understood it, although some members of the tribe did not. Aside from this, the treaty can not be changed or set aside by the courts under this Jurisdictional Act.

ARGUMENT

I

CLAIM FOR ADDITIONAL COMPENSATION FOR LAND CEDED UNDER THE TREATY OF 1858

The findings of fact made by the Court of Claims clearly refute the allegations made in the petition filed in the Court of Claims. They clearly show that appellants' claim that the amendments to the Treaty of 1851 were never assented to by the appellants is incorrect. The Court of Claims specifically finds that they were ratified. (R. 34.) The findings further refute appellants' contentions that they never made any agreement concerning these lands by treaty in 1858. The Court of Claims finds as a fact that by the Treaty of 1858 the disposition as well as the sum to be allowed for the lands on the north side of the Minnesota River was left to the determination of the Senate (R. 34), and that the Senate, acting pursuant to such au-

rangement determined that the land should go to the United States and the sum that should be allowed therefor, and such sum has been paid. (R. 35.) These facts seem to clearly bar any recovery on the basis alleged in the petition.

Appellants in their brief in this Court have changed their contention, and now claim that since the Court of Claims has found that the value of these lands on March 3, 1863, was $1.25 per acre, that this conclusively shows that there was a mistake upon the part of appellants and a mutual mistake between the parties to the Treaty of 1858, and that the value of the land at the date of action by the Senate in 1860 must have been $1.25 per acre and not 30c, the amount fixed by the Senate as the price to be paid by the United States.

In the first place, the Senate was not necessarily required to find the value of the lands under the treaty, but it was to determine the question of title of the lands, what disposition should be made thereof, and what sum should be allowed therefor. The Senate determined under all the circumstances appellants should be allowed 30 cents per acre. That was not necessarily a determination of the value. Further than that, it is altogether possible that the lands may have been of the value of 30 cents per acre in 1860 and $1.25 in 1863. These two facts are not necessarily and in all events inconsistent. But regardless of these matters, there is no occasion for the application of the doctrine of mu-

tual mistake, much less any theory of unilateral mistake. There were no representations on either side of values; there were no agreements of sale or price; but there was an express agreement, which has not been impeached, that the question of title, the disposition and the amount of the allowance should be determined by the Senate. The appellants agreed to this, and the Senate acted upon it. The amount was so determined, and has been paid. There is no reason or excuse for going back of such determination. Even if the Senate fixed the amount at only a small fraction of the actual value, such fact would not avoid the agreement. Under the agreement made by the appellants, the Senate might have fixed any sum which it saw fit. It did not agree to make such amount dependent upon the value. In leaving such authority and power to the Senate there is nothing in the findings to show that the Indians were in any manner imposed upon, treated unfairly or mistaken. There is also nothing in the findings showing that the Senate exercised this authority in bad faith or in such an arbitrary manner as to indicate bad faith. In these circumstances, the finding and action by the Senate have in nowise been impeached and must stand.

It might also be added that by the Act of February 16, 1863, Congress abrogated all treaties with appellants so far as such treaties purported to impose any further obligation upon the United States and forfeited all lands and rights of occupancy

within the State of Minnesota. (R. 35, 36.) There is no showing that the rights here claimed, even if they ever existed, were in any way subsequently restored. Other provisions were later made for the appellants.

II

CLAIM FOR COMPENSATION ARISING UNDER THE ACT OF MARCH 3, 1863

The Court of Claims found that in August, 1862, there was an outbreak of the Sioux Indians, including the appellants, in which many white people were massacred and a great amount of property destroyed. In consequence of this, Congress on February 16, 1863 (c. 37, 12 Stat. 652), abrogated and annulled all treaties with appellants and by an Act of March 3, 1863 (c. 119, 12 Stat. 819), provided that the President should set aside a tract of land sufficient to enable him to assign to each member of said bands who was willing to adopt the pursuit of agriculture 80 acres of good land. Pursuant to the Act there was selected for the four bands a tract at Crow Creek in the Dakota Territory. The prisoners held at Fort Snelling of these four bands of Indians totaled 1,601, of which number 295 belonged to the appellant bands, and 1,306 of these prisoners were removed to the new reservation. Military operations continued against the hostile members of the bands until 1864, and most of them were driven from Minnesota into the far west, some escaping into Canada. Some time later,

about 600 to 800 of them gathered (in 1866) in the vicinity of Fort Wadsworth. Attempts to make treaties with them proved unsuccessful for a time, and they remained there until the Lake Traverse and Devil's Lake Reservations were set aside for them in 1867. (R. 36, 37.)

Upon this statement of facts, regardless of whether the Act of 1863, concerning the setting aside of a reservation, was mandatory or otherwise, the conclusion by the Court of Claims and its reasons therefor are sound. The Court of Claims, in its opinion, very well states that (R. 54)—

> In the face of the record it is difficult to comprehend an insistence that the President was remiss in not setting apart 361,928 acres of land in 1863 for the Sisseton and Wahpetons, when these Indians at the time were fleeing from capture, openly hostile to the Government, and being closely and continuously pursued by the Army of the United States.

The court points out that such an obligation as that contended for would be an "unique obligation," and that such Act was obviously intended to remove these undesirable Indians from Minnesota, and in express terms allotted only to those individuals willing to adopt the pursuit of agriculture, hoping thereby to civilize them. As the court further says, it is inconceivable that Congress intended to do more than to provide for Indians in amity with the Government and respect for the laws,

while the major portion of these Indians were scattered and fleeing as rapidly as possible from the range of military activities. The court then points out that none of those for whom claim is now made appeared to have applied for enrollment at the Crow Creek Reservation, and those in amity who did were cared for. The court further finds as a fact that it does not appear how many were willing to adopt the pursuit of agriculture as required by said Act of 1863. (R. 38.)

By the treaty of 1867, Congress specifically made other provisions for those who had not been sent to the Crow Creek Reservation. The court then points out that the President could not accomplish the impossible, and that he was charged by law with providing for an existing and contemporaneous condition of affairs; that it would have been absurd to set aside a vast and extensive area when by no possible process of reasoning could he apprehend to what extent it would be taken up by the Indians, who had at least for the time expatriated themselves. The court concludes that the Act of 1863 was no more than a conditional grant.

The above reasoning of the Court of Claims is so logical and sound that nothing further need be said to sustain the conclusion which it reached that upon this item appellants could not recover.

III

CLAIM FOR COMPENSATION FOR LANDS ALLEGED TO HAVE BEEN CEDED BUT NOT PAID FOR UNDER THE TREATY OF SEPTEMBER 20, 1872

It will be noted that appellants in their petition in the Court of Claims rested their case upon the statement that the appellants believed that they were ceding only 8,000,000 acres of land, but they were misled by the Commissioners who negotiated the treaty as to the actual acreage, and that they did not intend to cede more than 8,000,000 acres. They also charged that but few of the Indians whose names appear on the treaty actually signed the same, and because of their inability to understand English advantage was taken of them, and some were actualy forced to sign. The findings of the Court of Claims fail to sustain any of these charges of improper conduct. These findings show that a commission was appointed to investigate the appellants' title to these lands and if title was found to be valid to negotiate for the relinquishment of same. The Commission investigated and negotiated a treaty; the treaty was presented to the Senate and there amended, and then ratified by the Indians on May 2, 1873. (R. 41, 42.) In all of this there is not word to show that any advantage was taken of the Indians. The Court of Claims did find that in making the agreement it was the understanding and belief of the parties that the approximate amount of land involved was 8,000,000

acres. (R. 42.) In this situation, the appellants in their brief contend that this shows a mutual mistake and therefore the Indians should recover. The Court of Claims specifically found that the value of the lands was not shown by the evidence (R. 43). In their brief appellants contend that court should assume the value of 10c an acre and award judgment for the Indians in that amount.

The transaction here involved was not a sale of land by the acre; the findings show that the Act of 1872 provided that the commission was to investigate the title and if necessary to negotiate a treaty concerning the disposition of lands mentioned and described in the second article of the Treaty of February 19, 1867. (R. 41.) This portion of the Treaty of 1867 described the land as beginning at a certain point and running along certain rivers or other designated lines until an area had been fully and completely described and designated. No mention whatsoever of acreage is made in such description. (R. 40.) The commission then estimated that the tract contained 8,000,000 acres, and the value of the right and title of appellants ought to be fixed at the sum of $800,000. There had been considerable question as to the right and title. It also appeared that some of the Indians claimed $200,000 more while one of the Commissioners felt that the sum should be less (R. 41), and the treaty as finally presented to the Senate provided that the Indians would cede, sell, and relinquish their right and title

in and to this tract "as well as all lands in the territory of the Dakota to which they may have title or interest" with certain exceptions therein named. It can not be said that in such a transfer as this, in which the property is described by metes and bounds and not by acres and in which they not only sell the area within the lines described but also include all of their lands in the territory of Dakota, that there was a sale in which either party had in mind any given number of acres. It was a sale by lot and not by acre. The price was, no doubt, fixed with a view to the entire territory comprehended within the metes and bounds designated, and not with a view to the number of acres designated. The mere fact that the total price fixed was at the rate of 10c per acre has but little significance when the Government had previously paid these Indians for other lands at the rate of 30c per acre, although some earlier sales were at the rate of 10c per acre.

There is no room in such a situation to say that a valid agreement properly made should be set aside upon the ground of a mutual mistake. Even though the parties may have thought that there were only 8,000,000 acres within the territory described by metes and bounds, it is evident that in dealing with such a vast area of more or less unsurveyed and undeveloped land that but little could be accomplished in the estimate of the number of acres involved, and that when the transaction was negotiated and

consummated that the matter paramount in the minds of both parties was that they were selling and buying an area bounded by rivers, lakes, mountains, or State lines and not a specific number of acres.

These facts considered in connection with the general release of all of the Indians' rights to land in the territory of Dakota conclusively show that the acreage was not the "yardstick" of the price. One side was willing to wipe out its claims to the whole tract described and anything further in the territory of Dakota for the price named; the other side felt that to thus clean up the situation was worth the sum fixed. The mere fact that both parties thought that there were about 8,000,000 acres of land in the territory specifically described by metes and bounds can in no way impair the transaction.

IV

CLAIM FOR PAYMENT OF THE PRINCIPAL OF THE TRUST FUND CREATED UNDER THE TREATY OF JULY 23, 1851

In their petition, filed in the Court of Claims, appellants contend that they did not understand or agree that the interest payments would extinguish all obligation to pay the principal, and that the treaty was confusing and was drawn up by the representatives of the Government for the purpose of confusing appellants. The Court of Claims found that some of the members of the appellant bands did not understand that the payment of interest would extinguish the principal, but that it did not appear that the provision on this point was misun-

derstood by the chiefs and headmen who represented the Indians in making the treaties. (R. 38, 39.)

Of course, the Government could deal only with the representatives of the Indians. No doubt there are many citizens of the United States who do not understand all of the treaties made by the duly authorized treaty-making power of the United States, but that would not affect the validity of any treaty so made. In this case the findings of the Court of Claims show that the authorized representatives of appellants with whom the Government dealt fully understood the treaty and therefore the validity of such agreement can not be successfully attacked. In their brief in this case, appellants have attempted to broaden their contention into an argument that since the treaty is not clear and the United States was dealing with an inferior race and the treaty works an unconscionable result, the court should grant relief. There is nothing in the findings to show that the treaty is unfair. Those charged with the duty of negotiating it understood the treaty as made. The courts have no authority to make new treaties for the parties; there is nothing impeaching the validity of this treaty.

V

THE JURISDICTIONAL ACT DOES NOT ENLARGE THE APPELLANTS' SUBSTANTIVE RIGHTS

There is very little in appellants' briefs to the effect that they have any legal rights in these mat-

ters. There is only a semblance of argument that they have any equitable rights such as would be enforced in a court of equity. Most of their contentions may be summarized into the statement that to give force and effect to the treaties as made would be unfair and work an unjust result upon the Indians; that because of such situation there is a moral obligation upon the Government, acting through the courts, to grant relief. As an excuse for this theory they seem to contend that the Jurisdictional Act in some way increased, enlarged, or broadened their substantive rights. There is nothing in the Jurisdictional Act enlarging the substantive rights of the parties. That Act merely affords a remedy for the determination of their rights "under any treaties or laws of Congress." To set aside a treaty or any of its provisions is not to enforce a right under it.

This Court, construing Jurisdictional Acts similar to the statutes here involved, has settled that such Acts make no change in substantive rights but merely afford a procedure for the enforcement of whatever substantive rights may otherwise exist.

In the case of *United States* v. *Old Settlers*, 148 U. S. 427, 468, 469, the Court, speaking through Mr. Chief Justice Fuller, said:

> • • • Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Con-

> gress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference.
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> * * * * *
>
> The settlement of a controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto, and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws, or holding them inoperative on the ground alleged.
>
> The Court of Claims was indeed to have "unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians may be fully considered and determined." But this did not mean that either party was entitled to have or receive by virtue of the act anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play for the disposal of the case. The inquiry was not to be technically limited by rules of procedure, or restrained by the distinctions between law and equity * * *.

In the case of *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500, Mr. Justice Van Devanter, who delivered the opinion of the Court, said:

The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States* v. *Old Settlers*, 148 U. S. 427, 469; *United States* v. *Choctaw &c. Nations*, 179 U. S. 494, 535; *Sac and Fox Indians*, 220 U. S. 481, 489.

CONCLUSION

For the reasons heretofore set forth, it is respectfully submitted that the judgment of the Court of Claims is correct and should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

APRIL, 1928.

O

SUPREME COURT OF THE UNITED STATES.

No. 596.—October Term, 1927.

The Sisseton and Wahpeton Bands of Sioux Indians, Appellants, vs. United States.	Appeal from the Court of Claims.

[May 28, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

Appellants filed their petition in the Court of Claims under the Act of April 11, 1916, c. 63, 39 Stat. 47, printed in the margin so far as material,[1] conferring on the Court of Claims jurisdiction to hear and determine all claims of the Sisseton and Wahpeton bands of Indians against the United States. The Court of Claims on its findings of fact and conclusions of law gave judgment dismissing the petition. 59 Ct. Cls. 302. This Court denied an application for certiorari October 10, 1927. The present appeal was taken

[1] "That all claims of whatsoever nature which the Sisseton and Wahpeton bands of Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all claims of said bands against the United States and also any legal or equitable defense, set off, or counterclaim which the United States may have against said Sisseton and Wahpeton bands of Sioux Indians, and to enter judgment, and in determining the amount to be entered herein the court shall deduct from any sums found due said Sisseton and Wahpeton bands of Sioux Indians any and all gratuities paid said bands or individual members thereof subsequent to March third, eighteen hundred and sixty-three: Provided, That in determining the amount to be entered herein the value of the land involved shall not exceed the value of such land on March third, eighteen hundred and sixty-three. If any such question is submitted to said court it shall settle the rights, both legal and equitable, of said bands of Indians and the United States, notwithstanding laps of time or statute of limitations."

under Act of Congress approved March 4, 1927, c. 522, 44 Stat. Part III, p. 1847. It specifically granted to appellants one year from date within which to appeal and was intended, we think, to confer a right of appeal as distinguished from the right to petition for certiorari within three months of the judgment, conferred by §§ 3 and 8 of the Jurisdictional Act of February 3, 1925.

Appellants ask review by this Court of four items of their claim, all of which were denied by the court below. All involve the question, among others, whether under the special act conferring jurisdiction on the Court of Claims the authority of that court was limited to adjudicating the rights of appellants arising under treaties and statutes of the United States, in accordance with accepted principles of law and equity, or whether it could go behind those treaties and statutes and allow recovery of amounts not authorized to be paid by them, on grounds of inadequacy of consideration and mistake.

The four items of claim now presented differ in some respects from the claims set up in the petition. The facts now relied on, so far as disclosed by the findings, to which the consideration of this Court is limited, may be summarized as follows:

I

APPELLANTS' CLAIM FOR ADDITIONAL COMPENSATION FOR LANDS CEDED UNDER THE TREATY OF 1858.

This claim is in substance founded upon an asserted difference between the value of certain lands of petitioners and the amount allowed and paid for them under treaties of the United States with the Indians and subsequent action taken under them. The Court of Claims found that the petitioners were two bands of the Sioux Indians, having their habitat prior to July 3, 1851, along the upper Minnesota River. On that date they negotiated a treaty with the United States, later modified by the Senate of the United States, and as modified ratified by the Indians and the United States government in September, 1852. 10 Stat. 952, 958. The treaty ceded to the United States all the lands of petitioners in the territory of Minnesota and Iowa.

By Article III as originally drafted reservations for the petitioners were set apart along the Minnesota River and following the negotiation of the treaty the petitioners, together with two other

bands, the Wahpakoota and Medawakanton Indians, were removed to those reservations. These provisions for reservations for the four bands were stricken out of the treaty as ratified and a new provision substituted that the Indians should be paid ten cents an acre for these lands, payment to be in lieu of the reservations as originally provided for in Art. III of the Treaty as negotiated, the sum so paid to be added to the trust fund for the Indians provided for in other sections of the treaty. The sum so paid and allotted to the trust fund amounted to $112,000. The President of the United States was authorized to set apart another reservation for these bands of Indians outside of the ceded territory, but no other reservation was in fact so set apart under the provisions of this treaty.

By Treaty of June, 1858, 12 Stat. 1031, 1037, it was stipulated that those portions of the reservations lying south of the Minnesota River should constitute reservations for the four bands with provisions for allotment and that the disposition to be made of the portions of the reservations on the north side of the river should be left to the United States Senate for decision. Senate Resolution of June 27, 1860, 12 Stat. 1042, provided that the Indians should be allowed 30¢ an acre for the lands lying on the north side of the river. These lands consisted of 469,080 acres for which the Indians were paid $170,880, payment being provided for by the Act of March 2, 1861, c. 83, 12 Stat. 221, 237.

In August, 1862 and until 1864, the Sisseton and Wahpeton bands participated in an outbreak of the Sioux Indians, during which many white settlers were massacred, and large amounts of property destroyed. In consequence, Congress, by Act of February 16, 1863, abrogated all treaties between them and the United States, declared all their lands and rights of occupancy within the State of Minnesota and all annuities and claims previously accorded to them forfeited and provided for payment of the damages suffered by citizens in consequence of the outbreak from funds of the Indians in the hands of the Government. By Act of March 3, 1863, lands in the reservation on the south side of the Minnesota River were sold, the Sisseton and Wahpeton bands ultimately receiving from the sale $647,457. The Court of Claims found that the value of these lands on March 3, 1863, was $1.25 an acre. The appellants argue here that as these lands were worth $1.25 an acre March 3, 1863, the

lands on the north side of the river were worth that amount when sold for 50¢ an acre three years before, June 27, 1860, and that they are now entitled to recover the difference, aggregating $541,120 between the value so ascertained and the amount actually received from the sale, on the ground that there must have been a material mistake of the parties as to the value of the land and that the jurisdictional Act under which this suit was brought authorized the recovery of the value of the land as of March 3, 1863.

II

APPELLANTS' CLAIM FOR COMPENSATION ARISING UNDER THE ACT OF MARCH 3, 1863, 12 STAT. 819

Following the Sioux Indian outbreak of 1862 Congress, by Act of March 3, 1863, c. 119, 12 Stat. 819, provided that the President should set apart for the Sisseton and Wahpeton bands, among others, unoccupied lands outside the limits of any state sufficient to provide each member willing to adopt the pursuit of agriculture with eighty acres of agricultural land. Shortly afterwards such lands were so designated and set apart at Crow Creek on the Missouri River in Dakota territory. At the time, as a result of military operations against the Indians, two hundred and ninety five full blood Indians of the Sisseton and Wahpeton bands, and one hundred and twelve half breeds of the four bands were military prisoners at Fort Snelling. They, with prisoners of other bands were removed to the reservation at Crow Creek, arriving there about May 20th of that year and lands were then finally set apart for them in the following July. Military operations were continued until 1864, during which most of the other members of the bands were driven out of the State of Minnesota to points west of the Missouri River and into Canada. After the cessation of military operations these other members of the two bands, numbering in 1866 between six hundred and eight hundred, gathered and settled near Fort Wadsworth in the eastern part of Dakota territory where, with the acquiescence of the government, they remained until 1867 when the Lake Traverse and Devil's Lake reservations were set apart for them.

In the meantime an unsuccessful effort had been made by the government to negotiate a treaty with these fragments of the bands for the extinguishment of their claim to lands in the Dakota terri-

tory, which claims were considered doubtful because the lands were claimed by other Indians. It does not appear that any material numbers of additional members of the bands went to the Crow Creek reservation or how many of them were willing to adopt the pursuit of agriculture.

By Art. II of the Treaty of February 19, 1867, the Sisseton and Wahpeton bands ceded to the United States the right to construct wagon roads, railroad and telegraph lines and other public improvements across the lands claimed by them and described in the treaty, and in consideration of the "confiscation of all their annuities, reservations and improvements" by the government, it was provided that there should be set apart a permanent reservation for such members of the bands as had not been sent to the Crow Creek reservation. Such reservations were set apart, which became known as the Lake Traverse and Devil's Lake reservations. On the basis of these findings appellants contend that under the Act of March 3, 1863, they were entitled to receive the value of an allowance of eighty acres of agricultural land for each member of the bands, aggregating 322,080 acres of land which, at $1.25 an acre, found by the Court of Claims to be the value at that date, amounts to $402,600.

III

Appellants' Claim for Compensation for Lands Alleged to Have Been Ceded but Not Paid For Under the Treaty of September 20, 1872.

By Act [illegible] 1872, c. 325, 17 Stat. 281, the Secretary of the Interior was directed to report to Congress what title or interest the Sisseton and Wahpeton bands had to any portion of the land described in the second article of the Treaty of February 19, 1867, under which the Lake Traverse and Devil's Lake reservations were set apart, and also "whether any, and if any, what compensation ought in justice and equity to be made to the said bands of Indians respectively for the extinguishment of whatever title they may have to said lands." Under the statute the Secretary appointed a commission to make an investigation of the Indians' title to the land and if it found such title to be valid and complete to negotiate for the relinquishment of the title upon terms "at once favorable to the government and just to the Indians."

On October 8, 1872, the commission reported that prior to the treaty of February 19, 1867, the title to the tract of the Sisseton and Wahpeton bands was doubtful, as other bands of Sioux Indians claimed a common interest in the lands, but that the United States had, by that treaty, recognized the title of the Sisseton and Wahpeton bands and was by it estopped from denying their title. The commission reported that it estimated the tract of land to have an area of over eight million acres and that the value of the lands should be fixed at the sum of $800,000, although the Indians urged $20,000,000 more than this sum as the proper value and one of the commissioners was of the opinion that $800,000 was more than should be allowed.

The commission submitted with its report a proposed treaty which it had negotiated with the Indians under date of September 20, 1872 (Kappler's Indian Laws & Treaties, Vol. 2, p. 1067), under which the bands were to cede all their interest in the lands as well as all lands in the territory of Dakota except the Lake Traverse and Devil's Lake reservations. The principal, but not the only, consideration was the $800,000 payable to the Indians in annual installments of $67,000 each, without interest.

By Act of February 14, 1873, c. 138, 17 Stat. 457, the Congress ratified and confirmed that portion of the treaty providing for the cession of the lands and the payment of $800,000 and appropriated $67,000 for the first installment payment. The treaty, as thus amended and confirmed by Congress, was ratified by the Indians May 2, 1873 (Kappler's Indian Laws and Treaties, Vol. 2, p. 1069). The stipulated annual installments were appropriated and paid, the appropriation acts providing that the several installments were "for the relinquishment by said Indians of their claim to or interest in the land described in the second article of the Treaty made with them February 19, 1867." 18 Stat. 167, 441; 19 Stat. 192, 287; 20 Stat. 81, 510; 21 Stat. 127, 406; 22 Stat. 81.

In making the treaty or agreement of September 20, 1872, it was the belief and understanding of the parties that the approximate area of the tract of land to be sold and ceded by the Indians was eight million acres. In fact, the actual area of the land, as later determined, was eleven million acres. The Court of Claims found that the value of the land was not satisfactorily shown by the evidence either on March 3, 1863, or at the time of the making of the agreement or treaty.

Appellants contend that there was a mutual mistake of fact as to the quantity of land ceded and that the Court of Claims should have awarded compensation at the rate of 10¢ an acre for the three million acres of land in excess of the eight million acres which was supposed to be the approximate area of the land at the time of the agreement.

IV

Appellants' Claim for Payment of the Principal of the Trust Fund Created Under the Treaty of July 23, 1851.

The Treaty of July 23, 1851, provided for the creation of a trust fund to be paid by the government to the Sisseton and Wahpeton bands for the cession by them of lands to the government under this treaty. It was provided that the fund should be held by the government and 5% interest on it paid annually by the government to the Indians for a period of fifty years, which payments when completed were to be full payment of and to extinguish the trust fund. Under the treaty as submitted to the Senate for ratification the amount of the trust fund was designated as $1,360,000, but under the treaty as amended by the Senate and ratified by the Indians this amount was increased to $1,472,000.

Until the Indian outbreak of 1862 and the Act of February 16, 1863, the government paid the stipulated annual payments and, notwithstanding the forfeiture of their rights by the Act of February 16, 1863, the government has, under subsequent acts of Congress, accounted to the Indians for the remaining payments covering the entire fifty year period, less such amounts as were paid to citizens for damages sustained by them by reason of the outbreak.

The petitioners claim the right to recover the full principal sum set apart for them in addition to the installments paid which, alone, the treaty authorized, on the ground that as the specified fund was designated as a trust fund the obligation of the government with respect to it could not be discharged by the payment of an amount equivalent to annual interest upon the fund for fifty years, and also because the Court of Claims found that some members of the two bands did not understand at the time the treaty was made that the payment of interest on the trust fund for fifty years was to be in full payment of the principal and did understand that

at the end of the fifty year period the principal was also to be paid over to the Indians.

It will be observed that of the four claims, Claims I, III and IV are based on alleged mistakes which are urged as a sufficient basis for disregarding the express provisions of the treaties and statutes concerned, Claim I being based on an alleged mistake as to the value of the land purchased under a treaty, Claim III being based on a supposed mistake as to the amount of land purchased by the government for a lump sum under a treaty, and Claim IV being based upon an alleged mistake of individual members of the bands as to the amount to be paid under the Treaty of July 23, 1851, although the Court of Claims found that it did not appear that their representatives, the chiefs and headmen who negotiated the treaty, did not understand the provisions of it.

It is also to be noted that there are no specific findings supporting the claims that the stipulated payments referred to in Claims I, III and IV were based on mistake or that different amounts would have been stipulated for and paid had the parties or either of them been aware of the supposed mistakes or the equitable considerations now pressed upon us. To supply the lack of such findings petitioners are compelled to rely on inferences which they seek to draw from the facts as found and already stated in this opinion.

If we were to assume that the act conferring jurisdiction on the Court of Claims in this case is broad enough to allow a recovery based upon mistakes or other considerations relating the treaties and acts of Congress with which we are now concerned, we should find it difficult to discern in the findings any basis for the inferences necessary to support a recovery on such a theory. But we think it plain that that act only gave authority to the Court of Claims to hear and determine claims "for the amount due, or claimed to be due said bands from the United States under any treaties or laws of Congress". It does not purport to alter or enlarge any rights conferred on petitioners by the treaties or laws of the United States or authorize any recovery except in accordance with the legal principles applicable in determining those rights under laws and treaties of the United States. *See United States* v. *Old Settlers*, 148 U. S. 427, 465, 469; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 509.

To give the relief now sought it would be necessary to render a judgment predicated upon the abrogation of express provisions of the treaties and statutes concerned and the substitution for them of other provisions which Congress has never enacted or authorized. These are political, not judicial powers. The Act does not purport to bestow such powers on the Court of Claims and it would require resort to a violent and inadmissible presumption to infer any such purpose in the act. Cf. *United States* v. *Old Settlers, supra;* and see *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 567.

The second claim stands upon a somewhat different footing, but here also are wanting findings of fact essential to support the claim. The Act of March 3, 1863, directed the President to set aside for the Sisseton and Wahpeton bands, lands sufficient in extent to enable them to assign to each member of the band "who is willing to adopt the pursuit of agriculture, eighty acres of agricultural land", but there is no finding showing how many, or that any of the Indians were willing to follow the pursuit of agriculture after the adoption of the Act of March 3. Hence there is no foundation for any recovery which might be awarded on the basis of allotments to which only those members of the band were entitled who were willing to follow the pursuit of agriculture.

So far as those members of the band in amity with the United States were concerned, the findings show that they were provided for in the Crow Creek reservation set apart under the act of Congress. Appellant's present claim extends to those who were then in active hostility to the United States, the subject of its military operations and who were fleeing from capture by the military arm of the government. The Act of March 3, 1863, passed at the very time of these operations could not, we think have been intended for the benefit of those Indians who were then in open hostility to the government and who for that reason did not avail of its benefits or comply with the conditions.

Nor can it now be deemed the basis of any claim for damages against the United States cognizable by a court—a conclusion at which we arrive quite independently of any consideration of the fact that the United States later made provision for these hostile and fugitive members of the two bands in the Lake Traverse and Devil's Lake reservations. Jurisdiction over them and their tribal lands was peculiarly within the legislative power of Congress and

may not be exercised by the courts in the absence of legislation conferring rights upon them such as are the subject of judicial cognizance. See *Lone Wolf* v. *Hitchcock*, *supra*, 565; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 483. This the jurisdictional Act of April 11, 1916, plainly failed to do.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.